In The

Supreme Court of the United States

October Term, 1978

No. 79-434

JAY NORRIS, INC., JOEL JACOBS and MORTIMER WILLIAMS,

Petitioners,

vs.

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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TABLE OF CONTENTS

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Contents

Page

Contents

APPENDIX

Contents

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on May 1, 1979.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 598 F.2d 1244 (2nd Cir. 1979) and is set forth in Appendix A. The course of administrative proceedings before

the Federal Trade Commission has been officially reported by that Agency at 91 F.T.C. 751 *et seq.* all of which is set forth in Appendix B as follows: Complaint-20a; Initial Decision-34a; Opinion by the Commission-103a; Final Order-128a.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on May 1, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). By order dated July 16, 1979, this Court extended petitioners' time to file the instant petition for a writ of certiorari to and including September 14, 1979.

QUESTIONS PRESENTED

1. Whether the First Amendment prevents the Federal Trade Commission from going beyond reasonable and effective statutory alternatives by issuing a cease and desist order which imposes a perpetual prohibition on all future unadjudicated commercial speech by petitioners, unless nonspecific collateral requirements for prior substantiation are met with the result that in a civil penalty enforcement proceeding (A) the Commission is relieved from the need for showing falsity or deception; and (B) petitioners are deprived of the right to establish truth, even by way of affirmative defense.

2. Whether the Federal Trade Commission has statutory authority to issue a cease and desist order which includes a perpetual prohibition on all future unadjudicated advertising by petitioners unless nonspecific collateral requirements for prior substantiation are met, and which effectively shifts the Commission's primary statutory burden of proof by authorizing a civil penalty enforcement proceeding where (A) the Commission is relieved from the need for showing falsity or deception; and (B) petitioners are deprived of the right to establish truth, even by way of affirmative defense.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provision involved herein is the First Amendment to the Constitution of the United States.

The statutory provisions involved herein are the Federal Trade Commission Act, 15 U.S.C. §45, and 15 U.S.C. §53(a). These provisions are set forth in Appendix D.

STATEMENT OF THE CASE

Since 1953, petitioner Jay Norris, Inc. has been a mail-order company engaged in the selling of gift, novelty and general merchandise products to the consumer.[1] This business is conducted by mailing catalogues listing hundreds of products to consumers throughout the United States, as well as by substantial national magazine and newspaper advertising. At issue in this petition is a ruling by the United States Court of Appeals for the Second Circuit which sanctions the imposition of unprecedented restrictions on petitioners' ability to communicate truthful information to the public.[2] Moreover, the Federal Trade Commission (hereinafter "FTC" or "the Commission") has announced its intention to require all advertisers to comply with the provisions of the cease and desist order issued in this case pursuant to its statutory authority under 15 U.S.C. §45(m) (Supp. 1979).[3] If not set aside the Second Circuit's ruling will have a drastic and restrictive impact throughout the United States on advertisers presenting truthful information to the public.

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1. Petitioners Joel Jacobs and Mortimer Williams are officers of Jay Norris, Inc.

2. *Jay Norris, Inc. v. F.T.C.*, 598 F.2d 1244 (2d Cir. 1979) (Appendix A).

3. *See* 91 F.T.C. 751, 857 (1978) (Appendix B at 126a) (Section 5 of the Federal Trade Commission Act, 15 U.S.C. §45, is set forth in Appendix D).

This proceeding began with a "garden variety" FTC staff complaint alleging that various parties, including the petitioners' here, had misrepresented seven products in the course of mail-order business operations.[4] The otherwise routine complaint was transformed into a major FTC test case by the inclusion in the proposed order of an all-encompassing requirement of prior substantiation which would have prohibited any and all advertising claims whatsoever unless certain technical substantiation requirements were met.[5] Never before had such an all-encompassing order been entered in an FTC proceeding. Also significant is the absence from the complaint of any charge that the petitioners, in their advertisements, had made any representations concerning the extent of their prior substantiation for any given product.

An extensive hearing was held before an Administrative Law Judge where most of the charges were vigorously disputed. The Administrative Law Judge rendered an initial decision which dismissed the complaint as regards one of the products in question,[6] but sustained most, but not all, of the charges in the

4. The complaint also included various charges concerning unfair practices relating to the conduct of mail-order business in general. These provisions, not at issue here, resulted merely in the issuance of an order which required petitioners to comply with the provisions of a subsequently enacted trade regulation rule.

5. Petitioners' answer to the complaint dealt with this request as follows:

> "There is no legal basis for the absolute requirements set forth in paragraph 9 of the proposed order. Scientific tests, etc., may not be necessary with respect to all products. Common knowledge may establish the safety of products without the necessity for a company conducting separate 'scientific tests.' There is similarly no legal basis and there can be no legal requirement for so vaguely defined a standard as 'other competent objective material.'"

6. 91 F.T.C. at 795 (Appendix B at 64a).

complaint with respect to the other six products. He recommended to the Commission a remedial cease and desist order, which included a modified "prior substantiation" provision. Upon appeal to the Commission, most, but not all, of the findings of the Administrative Law Judge were sustained. A final order was entered which included a once-again modified "prior substantiation" provision. An appeal to the United States Court of Appeals for the Second Circuit followed pursuant to the judicial review provisions of 15 U.S.C. §45(c) (1973).

In view of the overriding importance of the unprecedented, all-encompassing "prior substantiation" order,[7] all of the other vigorously disputed issues in the case were disposed of by agreement and stipulation of counsel. The Second Circuit was left with only this major issue for resolution. The Second Circuit upheld the FTC's order but modified it because it was "poorly phrased"[8] and "ungramatical, as well as badly worded."[9] The thrice-modified order is now presented to this Court for review by way of the instant petition for certiorari.

In its opinion, the Commission found that petitioners had misrepresented a safety characteristic for one product

7. The order in this case should not be confused with situations where prior substantiation provisions are used as an escape clause to an otherwise absolute prohibition on the making of a claim which has been found to be false. *Fedders Corp. v. F.T.C.*, 529 F.2d 1398 (2d Cir.), *cert. denied*, 429 U.S. 818 (1976). Also distinguishable are situations where the advertising itself was found to have made misrepresentations concerning the existence of prior substantiation, *National Dynamics Corp. v. F.T.C.*, 492 F.2d 1333 (2d Cir.), *cert. denied*, 419 U.S. 993 (1974), or where specific findings are made that an advertisement has misrepresented the quality or extent of prior substantiation efforts. *Porter & Dietsch, Inc. v. F.T.C.*, ___ F.2d ___ (7th Cir. Nos. 78-1324, 78-1497, Aug. 8, 1979) 1979-2 Trade Cases ¶62,796; *Firestone Tire & Rubber Company v. F.T.C.*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973). None of these factors are present here.

8. 598 F.2d at 1245 (Appendix A at 2a).

9. 598 F.2d at 1253 (Appendix A at 18a).

(automobiles)[10] and the performance characteristics of four products.[11] Two other products were found to have been misrepresented, but not in terms of safety or performance characteristics.[12]

Based upon the foregoing, the Second Circuit authorized the Commission to enter an order by which petitioners are prohibited:

> ". . . from representing the safety or performance characteristic(s) of *any* product unless petitioners have a reasonable basis for the representation(s) consisting of *competent* and *objective* material, available in *written* form, that *fully and completely* substantiates such representation(s)."[13] (Emphasis added.)

This seemingly innocuous language portends drastic consequences for petitioners in the conduct of their business operations. The impossibility of applying these vague criteria to establish compliance for the multitude of mail-order products sold by Jay Norris was explained to the Second Circuit, and sample advertisements were submitted to the court to illustrate the difficulties involved.[14] The Second Circuit, in upholding the order, however, confirmed petitioners' concern as to its broad

10. As regards another product (roach powder), safety was not actually an issue, and petitioners were merely required to disclose in future advertisements that safe use required the following of the directions provided with the product.

11. A flame gun, roach powder, TV antenna and automobiles.

12. A Lincoln-Kennedy penny as to historical and numismatic value and a flashlight as to the coverage of the manufacturer's guaranty.

13. 598 F.2d at 1253 (Appendix A at 18a-19a).

14. Copies of these advertisements are set forth in Appendix C.

and all-encompassing scope. Petitioners are prohibited from making even a truthful claim if, at the time they make the claim, they did not have "in written form," "competent and objective material," which fully and completely substantiates the safety or performance characteristic of "any" product.

Petitioners' concern with this provision lies in the Commission's authority under 15 U.S.C. §45(l) (Supp. 1979) to commence a civil penalty proceeding for violation of the cease and desist order. The Second Circuit held that, in such a future proceeding, the Commission's sole burden would be to prove:

> "(1) that Norris made a safety or performance representation and (2) that it lacked adequate substantiation *at the time that it made the advertising claim.*"[15] (Emphasis added.)

Under this formulation, if a court were to find, for any product, that petitioners' "prior substantiation" did not comply with any one of the vague requirements (*i.e.*, "reasonable basis," "competent and objective material", "available in written form" or "fully and completely substantiates"), petitioners could be subjected to civil penalties for violation of the cease and desist order.[16] The Commission would not have to prove that the safety or performance claim itself was false, deceptive or unfair. Even if petitioners could prove that the claim was in fact true, there would be no defense to the civil penalty proceeding.

Under the Second Circuit's ruling, only the adequacy and reasonableness of the written substantiation which was available

15. 598 F.2d at 1249 (Appendix A at 10a).

16. 15 U.S.C. §45(l) provides for a penalty of up to $10,000 for each violation, with each separate advertisement constituting a separate offense, and each day of continuation of a failure to obey a cease and desist order also to be deemed a separate offense. The potential penalties for even a single product advertisement are thus astronomical.

to the advertiser at the time the claim was made could be considered. There can be no doubt (and we do not believe that the Government will contest) that the cease and desist order can result in the imposition of substantial civil penalties without any finding of falsity or deception in the advertisement itself, and without affording petitioners an opportunity to show the truthfulness of its advertisements, even as an affirmative defense.

The prejudicial impact of the order at issue herein cannot be overstated. Most products sold and advertised by petitioners necessarily involve at least a performance characteristic. If, for example, petitioners desired in the future to advertise Bayer aspirin with a performance claim "for the temporary relief of minor aches, pains, headaches and fever," such advertisement could fall within the scope of the all-encompassing cease and desist order approved in this case. The same would be true for the corn skewers advertised by petitioners (*see* Appendix C) to help prevent burned and buttery fingertips while eating hot corn, as well as virtually every other product routinely sold in a mail-order catalogue. Petitioners would be in violation of the cease and desist order unless, before advertising Bayer aspirin or corn skewers, they had a reasonable basis for those performance claims based upon *competent* and *objective* material available in written form that *fully* and *completely* substantiated the claim for relief of minor aches and pains, headaches and fever, and prevention of burnt and buttery fingers.

Most disheartening is the further impact of the order in a civil penalty proceeding. If petitioners sought to introduce testimony affirmatively proving that Bayer aspirin is effective or that the corn skewer advertisement is accurate, they would be barred from doing so unless the information had been available to them in written form at the time the claim was made. Even if petitioners believed in the truth of the representations made and the sufficiency of available data, they would nevertheless be subject to the uncertainty that a court might later find that their

belief did not have a "reasonable basis," since the data available to them was not sufficiently "competent," "objective" or was not as "full and complete" as might theoretically be desirable.

It is respectfully submitted that, short of submitting an advertisement, together with the written substantiating data, to the Commission for review prior to advertising every product hereafter sold by petitioners, there will be no reasonable way for petitioners to conduct their mail-order business. Otherwise, the uncertainties inherent in the all-encompassing prior substantiation order approved by the United States Court of Appeals for the Second Circuit automatically subjects them to the risk of substantial civil penalties for each and every product they sell. The serious legal issues raised herein and the drastic implications for petitioners and all other advertisers, fully warrant the granting of this petition.

REASONS FOR GRANTING THE WRIT

I.

Review should be granted to define the scope of First Amendment standards applicable to cease and desist orders issued by the Federal Trade Commission and to resolve the conflict among the circuits in that regard.

The attempt by the Federal Trade Commission in this test case to expand the scope of its authority in issuing cease and desist orders runs afoul of the important constitutional protections applicable to commercial speech. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85 (1977); *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975); *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973).

Four circuit courts of appeal have agreed that First Amendment considerations dictate that the Federal Trade Commission must exercise restraint in formulating remedial orders which infringe on protected commercial speech and which may further amount to impermissible prior restraints on such speech. *Standard Oil Company of California v. F.T.C.*, 577 F.2d 653, 662 (9th Cir. 1978); *National Commission on Egg Nutrition v. F.T.C.*, 570 F.2d 157, 164 (7th Cir. 1977), *cert. denied*, ___ U.S. ___, 58 L. Ed. 2d 113 (1978); *Warner-Lambert Co. v. F.T.C.*, 562 F.2d 749, 768-71 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978); *Beneficial Corp. v. F.T.C.*, 542 F.2d 611, 619-620 (3d Cir. 1976), *cert. denied*, 430 U.S. 903 (1977).

Under the standard adopted by these circuits and based upon the decisions of this Court, the Federal Trade Commission is required to select the least restrictive remedy which is reasonably required to prevent recurrence of the violations which have been adjudicated.

In *Beneficial Corp. v. F.T.C., supra*, the Third Circuit applied this First Amendment standard in vacating an order by the Commission because it went further than was necessary for the elimination of deception. 542 F.2d at 619-620. The Ninth Circuit, in *Standard Oil Co. of California v. F.T.C., supra*, applied the same standard in vacating another Commission order, further emphasizing that:

> ". . . administrative agencies may not pursue rigorous enforcement to the extent of discouraging advertising with no concomitant gain in assuring accuracy and truthfulness." 577 F.2d at 662.

In *National Commission on Egg Nutrition v. F.T.C., supra*, the Seventh Circuit struck down one portion of an FTC order because "[t]he First Amendment does not permit a remedy which is broader than that which is necessary to prevent

deception, . . . or correct the effects of past deception." 570 F.2d at 164. *Accord, Encyclopedia Britannica, Inc. v. F.T.C.*, ___ F.2d ___ (7th Cir. No. 76-1477, Aug. 2, 1979), 1979-2 Trade Cases ¶62,793 at 78,610-11 [applying standard but finding that given remedy was the least restrictive alternative].

The D.C. Circuit has similarly indicated its acceptance of this standard in *Warner-Lambert Co. v. F.T.C., supra*. The court upheld an FTC order based upon an express finding that a less restrictive remedy was not available under the facts of that case. 562 F.2d at 770-771. *See also, Standard Oil Co. of California v. F.T.C.*, 577 F.2d at 662, n.5.

The foregoing standard was implicitly adopted by this Court in its affirmance of the D.C. Circuit in *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978). The District Court in that case had found that a professional organization's prior statements on an issue of competitive bidding had violated the antitrust laws and, accordingly, enjoined the organization from continuing to make the unlawful statements. The Court of Appeals upheld this restriction but struck down a further requirement that the organization affirmatively issue statements in support of competitive bidding. *United States v. National Society of Professional Engineers*, 555 F.2d 978, 984 (D.C. Cir. 1977). The D.C. Circuit reiterated the standard that regulation of commercial speech by the State ". . . should not be more intrusive than necessary to achieve fulfillment of the governmental interest." *Id.* This Court affirmed the decision of the Court of Appeals as regards the injunction which was issued and noted that in that type of case the remedy was an "unavoidable consequence of the violation." 435 U.S. at 697.[17]

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17. This Court added that it agreed with the standard laid down by the Court of Appeals and that under the circumstances, the injunction issued was not more intrusive than reasonably necessary to eliminate the consequences of the illegal conduct. *National Society of Professional Engineers v. United States*, 435 U.S. at 697-698.

The United States Court of Appeals for the Second Circuit, in the instant case, upheld the broad restriction on petitioners' speech without engaging in the substantial analysis indicated by the rulings of the Third, Seventh, Ninth and D.C. Circuits.

Instead, the Second Circuit said only that it considered the blanket remedy of prior substantiation to be "reasonable."[18] The adoption of this much broader standard was apparently the result of the Commission's express argument below, that the standard adopted by the Third, Seventh, Ninth and D.C. Circuits is erroneous.[19] Moreover, the Commission argued that the opinion of this Court in *National Society of Professional Engineers v. United States* was intended to imply that mere reasonableness of an FTC restraint on commercial speech is always enough to pass constitutional muster.[20] ***But see*** text accompanying n. 17, *supra*.

It is respectfully submitted that certiorari should be granted in this case to resolve the conflict between the circuits as to the applicable First Amendment standard governing the issuance of FTC cease and desist orders and to determine under such standards whether the broad prior substantiation order issued in this case is permissible.

The prior substantiation provision reflects a total lack of administrative restraint in imposing an infringement upon truthful commercial speech and goes far beyond the least restrictive interference which is reasonably necessary to accomplish legitimate governmental objectives. Moreover, even under the formulation adopted by the Second Circuit, the prohibition must be considered as completely unreasonable when its practical results are considered in terms of the drastic infringement of the exercise of protected free speech rights.

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18. 598 F.2d at 1252 (Appendix A at 18a).

19. Brief of Respondent in Second Circuit at 35.

20. *Id.* at 34-36.

Here, the Federal Trade Commission has gone far beyond the confines of its statutory objectives as set forth in the Federal Trade Commission Act. The prior substantiation order prohibits all truthful commercial speech hereafter entered into by petitioners unless the technical requirements are met. While the theoretical purpose of prior substantiation is to insure truthful and non-deceptive advertising, the opposite results from the order. Truthful advertising is prohibited, and penalties are imposed for failing to comply with abstract propositions inherent in the prior substantiation order.

The vice in the FTC order at issue is that it seeks to regulate the reasonableness of opinion and belief by petitioners instead of the actual content of their future advertisements. By ignoring truth or falsity, the FTC would, instead, in future civil penalty proceedings, look only to the reasonableness of petitioners' belief as to the truth or falsity of a safety or performance characteristic. This strikes at the very heart of First Amendment protections to which petitioners are entitled. Petitioners should not be subjected to the risk of having their *opinion* as to truth or falsity second-guessed by the Federal Trade Commission, based upon a finding that their *opinion* was not *"reasonable"* due to a technical failure to comply with the "competent", "objective", "full", or "complete" substantiation requirements.

Although commercial free speech is not necessarily entitled to the full scope of protection otherwise available under the First Amendment, this Court has emphasized that this is so only because an advertiser who disseminates information concerning his products or services presumably can determine more readily than others whether his speech is truthful and protected. *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. at 771-772, n. 24. The instant prior substantiation order completely destroys petitioners' ability to rely upon their own determination that their proposed speech is protected. Petitioners are subjected to uncertainty and interference as to each and every performance or safety claim

they may make: not in terms of inherent truth, falsity, fairness or deception, but rather, in terms of the adequacy of the procedures by which petitioners reach their decision to disseminate commercial information.[21] The First Amendment cannot be interpreted to, in effect, permit the transformation of the Federal Trade Commission into a *de facto* national censoring board for all advertisers.

The Second Circuit discussed its rejection of petitioners' First Amendment claim solely in terms of this Court's decision in *Friedman v. Rogers*, ___ U.S. ___, 59 L. Ed. 2d 100 (1979). Apparently, the Second Circuit construed this recent decision as a retreat from the principles previously expressed by this Court with regard to protected commercial speech. This Court, however, stressed that such was not the case, and while upholding a ban on the use of a trade name, stated:

> "We emphasize, in so holding, that the restriction on the use of trade names has only the most incidental effect on the content of the commercial speech of Texas optometrists . . . [T]he factual information associated with the trade names may be communicated freely and explicitly to the public." ___ U.S. at ___, 59 L. Ed. 2d at 113-114.

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21. The Second Circuit dismissed petitioners' concerns with respect to the foregoing, by reference to the Rules of the Federal Trade Commission which provide an opportunity for the receipt of advice from the Agency prior to the publication of any advertisement. *See* 598 F.2d at 1251 (Appendix A at 14a). The Ninth Circuit has pointed out that the vice inherent in such a restriction lies:

> "also in the requirement that one who is subject to its terms must 'either expose his major business decisions to a Commission veto or remain in the dark regarding their legal consequences . . . .' [citations omitted]" *Standard Oil Company of California v. F.T.C.*, 577 F.2d 653, 662 (9th Cir. 1978).

Here the opposite is true since the restrictions imposed by the all-encompassing prior substantiation order impinge directly on the content of protected speech. Review should be granted to correct the Second Circuit's serious misconstruction of this Court's decision in *Friedman v. Rogers, supra.*

There can be no doubt that the prior substantiation order was not the least restrictive remedy which was reasonably available to the Commission for the violations found. This was a test case seeking to expand the Commission's authority and was expressly so regarded by the Commission below. FTC advised the Second Circuit that, in reliance upon the expansive prior substantiation provision, it had entered only narrow prohibitions with regard to the six products found to have been misrepresented. In the event that the Court would find the prior substantiation provision unlawful, the Commission requested that it be given a new opportunity upon remand for consideration of the application of more traditional remedies.[22]

The alternative and constitutionally permissible remedies reasonably available to the Commission are obvious. First, the remedial order in this case contains prohibitions on misrepresentations with respect to the six products which were found to have been misrepresented. These have been drafted in a manner which already includes some "fencing in" beyond the specific misrepresentations which were found. Conceivably, if any of these involve a specific type of practice which is reasonably capable or likely of repetition with regard to other unrelated products, a broader order might have been entered in that regard. Instead, the Commission found that there was no

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22. "Because it entered the substantiation provision, the Commission entered only a narrow prohibition of misrepresentations of six specific products which were found to have been misrepresented. If it were unable to enter a substantiation order, the Commission should be able to consider whether to issue a broader prohibition of misrepresentation of performance or safety characteristics." Brief for Respondent before Second Circuit at 39, n. 28.

common element amongst the various findings of misrepresentation which could be applied across the board to other products. This should have dictated that remedial provisions adopted with specific reference to those products were sufficient. Instead, the Commission added a broad prior substantiation provision, totally unrelated to the violations found. There was neither evidence of, nor any finding that, the advertisements in question made any reference to the extent of prior substantiation, or that petitioners' prior substantiation efforts were in any way related to the claims found objectionable.

In the latter respect, all of the cases cited by the Second Circuit as precedent for upholding substantiation requirements are radically different from the case at bar. *See Fedders Corp. v. F.T.C.*, 529 F.2d 1398 (2d Cir.), *cert. denied*, 429 U.S. 818 (1976); *National Dynamics Corp. v. F.T.C.*, 492 F.2d 1333 (2d Cir.), *cert. denied*, 419 U.S. 993 (1974); *Firestone Tire & Rubber Company v. F.T.C.*, 481 F.2d 246 (6th Cir.), *cert. denied*, 414 U.S. 1112 (1973). In each instance, the substantiation requirement was limited to one type of product or was occasioned by the fact that prior advertising had been found to misrepresent the nature or existence of prior substantiation. Here, no such finding was made by the Administrative Law Judge or the Commission and prior substantiation was engrafted into the cease and desist order independent or any relationship to actual violations found in the advertising content.[23]

The statutory remedies which entitle the Federal Trade Commission to adjudicate truth or falsity in an administrative hearing are available for the correction of any future unfair

23. The Commission contends that it is entitled to include this type of prior substantiation provision in any cease and desist order which follows an adjudication of misrepresentations. Brief for Respondent in Second Circuit at 18.

advertisements by petitioners.[24] If the Commission believes that such proceedings are too time consuming or insufficient to protect the public, the statute further provides the remedy of a direct application to a United States District Court for injunctive relief under 15 U.S.C. §53(a). The blanket prohibition applicable to all products bypasses the basic statutory procedures and is not necessary for the protection of the public. The mere convenience which would accrue to the Federal Trade Commission from being relieved of its burden in an injunction action under 15 U.S.C. §53(a) is not a constitutionally permissible reason for authorizing an immediate action for civil penalties as against non-adjudicated truthful commercial speech.

The incongruous, burdensome and unreasonable results which can obtain as a result of this type of prior substantiation order are clear. Petitioners might be subjected to severe sanctions for failure to comply with the technical requirements of "full and complete" substantiation, while the very same claim by another company could escape enforcement consequences because the Commission could not or would not undertake to meet its burden of establishing falsity, deception or unfairness. Even more bizarre is the fact that the prior substantiation order does not permit the assertion of truth, even as an affirmative defense in rebuttal to any charge of violation.

If a safety or performance characteristic claim is completely true, and the advertisement makes no misrepresentations as to the nature or extent of prior substantiation, then no

24. The Commission and the Second Circuit make reference to the fact that this is the third proceeding which Jay Norris has had before the Commission. One of these was a consent order and, in any event, none of them involved any misrepresentations of safety or performance claims. There is no merit to the implicit suggestion that petitioners are frequent and flagrant violators of the Act. Even if so, the speedy remedy of injunction under 15 U.S.C. §53(a) is the proper alternative to the constitutionally impermissible prohibition on truthful commercial speech.

governmental or public interest is served by prohibiting such advertising. Such advertising is in no way unfair to the consumer and cannot be prohibited. The essential issue presented to this Court for review is the propriety of such an absolute *per se* ban by the Commission on all advertising, for *all* products hereafter sold by petitioners, which is based upon requirements unrelated to the inherent truth or accuracy of a given advertisement.

The constitutional infirmity of the prior substantiation order herein is further demonstrated by the violation of all of the traditional restrictions on the Commission's authority to issue cease and desist orders. *See* Point II, *infra*. Review is urgently needed in order to resolve the circuit conflicts as to standards for First Amendment protection and to further insure that the basic protections established by this Court in this decade with respect to commercial speech are not effectively destroyed by the order sanctioned in this case.

II.

Certiorari should be granted to determine the propriety of a cease and desist order which defeats the statutory enforcement scheme under the Federal Trade Commission Act and further violates all of the judicial standards governing the issuance of such orders.

In addition to the serious violations of First Amendment principles, the cease and desist order also violates all of the fundamental criteria for the issuance of such orders as a matter of statutory interpretation. The statutory scheme under the Federal Trade Commission Act, 15 U.S.C. §45, contemplates a two-step procedure which is defeated by the instant FTC order. First, the statute requires the Commission to establish that an unfair or deceptive act or practice has been committed in accordance with the hearing requirement of 15 U.S.C. §45(b).[25]

25. If the Commission believes that more expeditious relief is needed, it can apply directly to the United States District Courts for an injunction under 15 U.S.C. §53(a).

If a violation is found, this section authorizes the Commission to enter a cease and desist order against "such act or practice." After the cease and desist order becomes final, a further violation with respect to the same previously adjudicated act or practice results in the severe sanctions of a civil penalty proceeding under 15 U.S.C. §45(l). In the instant case, the FTC is entitled to invoke the drastic sanctions of a civil penalty proceeding without any prior adjudication of falsity, unfairness or deception. Any further advertisement, which has absolutely no relationship to the advertisements or deceptive practices found in the instant case, enables the FTC to bypass the first stage hearing requirement and proceed directly to the civil penalty provisions. Congress clearly did not intend to give the Commission such authority.

Under the statute, the FTC is required to prove falsity, unfairness or deception in the first instance by conducting a full adjudicatory hearing. Here, the cease and desist order shifts the statutory burden of proof by bypassing the adjudicatory hearing and subjecting petitioners to sanctions in a civil penalty proceeding solely if petitioners have not previously proven their claims by a "reasonable" basis. The order should be recognized for what it is in fact — an attempted administrative shortcut applicable to all future advertisements by petitioners aimed at bypassing the specific adjudicatory process which is a prerequisite for any penalty proceeding.

The basic purpose of the statute is further frustrated by the prohibition on truthful commercial speech, which is not false or deceptive in any manner, merely because the technical requirements of the prior substantiation clause are not met. If the safety or performance claim is completely true and the advertisement does not misrepresent or falsely describe any prior substantiation characteristic, the public is not injured and the statute was never meant to apply. This Court, for example, agreed with the First Circuit decision in *Colgate-Palmolive Company v. F.T.C.*, 310 F.2d 89, 94 (1st Cir. 1962) which stated

that where the consumer is not injured in light of correct and accurate representations of a product, there is no violation of the statute merely because of a collateral inaccuracy. *See F.T.C. v. Colgate-Palmolive Company*, 380 U.S. 374, 379-381 (1965). In the *Colgate* case, this Court upheld the FTC's appeal from a subsequent decision of the First Circuit only because the Commission had specifically found that the collateral inaccuracy of the use of a prop in a television advertisement was false or misleading because the advertising itself represented that the viewers were seeing an actual rather than a simulated performance test.

Under the statute, the courts have previously upheld prior substantiation orders only when the advertisement itself was found to have falsely or deceptively represented the nature of prior substantiation characteristics. *See, e.g., Firestone Tire & Rubber Co. v. F.T.C., supra.* Here, none of the advertisements in question were found to have represented anything as regards the nature of prior substantiation and the cease and desist order is not limited to future advertisements which make such representations. The result is that completely truthful and lawful advertisements are prohibited by the cease and desist order merely because the collateral technical requirements of a prior substantiation provision might not be complied with. Such agency action is without any statutory foundation or support.

This Court has emphasized that the severity of possible penalties prescribed by the statute for violations of a cease and desist order "underlines the necessity for fashioning orders which are, at the outset, sufficiently clear and precise to avoid raising serious questions as to their meaning and application." *F.T.C. v. Henry Broch & Company*, 368 U.S. 360, 367-368 (1962). Specificity and clarity are unmistakenly absent from the cease and desist order entered in this case. Petitioners have been told that they must have a "reasonable" basis for their advertisements. The use of the vague "reasonable" standard of conduct as a basis for a cease and desist order was condemned

long ago in *Asheville Tobacco Board of Trade, Inc. v. F.T.C.*, 294 F.2d 619, 627-629 (4th Cir. 1961). The requirements of "competent" and "objective" material which provides a "reasonable" basis to believe that a safety or performance claim is "fully" and "completely" substantiated is impossibly vague and indefinite as a penal standard for future conduct. *See Trans World Accounts, Inc. v. F.T.C.*, 594 F.2d 212, 216-217 (9th Cir. 1979); *Speigel, Inc. v. F.T.C.*, 540 F.2d 287 (7th Cir. 1976). *See also, F.T.C. v. Cement Institute*, 333 U.S. 683, 726 (1948).

The courts have also required that FTC cease and desist orders be no more restrictive than necessary to correct the violations found. *See, e.g., Trans World Accounts, Inc. v. F.T.C.*, 594 F.2d at 216. While some "fencing in" is authorized, the prohibitions must be reasonably related to the violations found at the adjudicatory hearing. Overbroad cease and desist orders have thus been rejected. *See, e.g., Spiegel, Inc. v. F.T.C.*, 540 F.2d at 295-296.

There was no finding in this case that the violations found with respect to the six advertisements were in any way connected with the nature of petitioners' prior substantiation efforts.[26] Without any relationship to actual past violations, FTC imposed a prohibition applicable to all future advertisements without any limitation whatsoever. This, petitioners repectfully submit, is *per se* overbroad.[27]

Petitioners recognize that the prohibition against overbreadth and vagueness in cease and desist orders is subject

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26. In fact, there was no evidence below dealing with petitioners' prior substantiation efforts since the complaint did not charge that the advertisements misrepresented any aspect of petitioners' "prior substantiation". As a result, no findings were made relating to prior substantiation deficiencies.

27. Overbreadth, in the instant case, is so extreme that it even precludes the assertion of truth as an affirmative defense.

to exception in certain circumstances. Thus, a broad order may be justified if an adjudicated specific practice is capable or likely of repetition with respect to other products. *See, e.g., F.T.C. v. Colgate-Palmolive Company*, 380 U.S. at 394-395. On the other hand, some vagueness as to what is a future violation can be tolerated where it is limited to a specific product for which some other violation has been adjudicated. To combine both vagueness and overbreath without any reasonable relation to the actual practices committed by petitioners is, however, unprecedented in the history of enforcement under the statute.

FTC has imposed the instant remedy of prior substantiation of all future safety and performance characteristics in an admitted test case designed to have applicability to all advertisers. FTC intends to use this type of order as a standard provision in future enforcement proceedings. Certiorari should be granted to determine the legality of this type of blanket provision which, in one paragraph, violates in combination, all of the basic restrictions and limitations which have previously been placed on cease and desist orders as a matter of statutory construction. The importance of this issue warrants immediate review to set aside this completely unjustified attempt by FTC to bypass the traditional statutory requirements.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioners

APPENDIX A — OPINION OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, JAY NORRIS, INC., OFFICIALLY REPORTED AT 598 F.2d 1244 (2d Cir. 1979)

JAY NORRIS, INC., Joel Jacobs, and Mortimer Williams, Petitioners,

v.

FEDERAL TRADE COMMISSION, Respondent.

No. 623, Docket 78-4151

United States Court of Appeals, Second Circuit

Argued Feb. 22, 1979

Decided May 1, 1979.

Review was sought of a cease and desist order of the Federal Trade Commission prohibiting a mail order business from representing and advertising the safety or performance of any product without prior written substantiation of the representations. The Court of Appeals, Oakes, Circuit Judge, held that the order was not invalid as imposing the burden of proof on petitioners in future enforcement proceedings, as being outside the Commission's statutory power, as being overbroad, vague or indefinite, as being tantamount to industry-wide rulemaking or as violating the First Amendment.

Order rephrased and enforcement granted.

Robert Ullman, Bass, Ullman & Lustigman, New York City, for petitioners.

Appendix A

Jerold D. Cummins, Deputy Asst. Gen. Counsel, F.T.C., Washington, D.C. (Michael N. Sohn, Gen. Counsel, Gerald P. Norton, Deputy Gen. Counsel, W. Dennis Cross Asst. Gen. Counsel, Clarence R. Laing, Jr., Atty., Washington, D.C., of counsel), for respondent.

Before FEINBERG, OAKES and VAN GRAAFEILAND, Circuit Judges.

OAKES, Circuit Judge:

Petitioners, a gift and novelty mail-order house and its two shareholders, officers, and directors, launch a multi-pronged attack against one rather poorly phrased paragraph of a lengthy Federal Trade Commission cease and desist order issued under Section 5(a) of the Federal Trade Commission Act (the Act), 15 U.S.C. §45(a).[1] After a series of modifications[2] the paragraph

1. Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. §45(a), provides:

> Unfair methods of competition unlawful; prevention by Commission—Declaration of unlawfulness; power to prohibit unfair practices
>
> (a)(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce are declared unlawful.
>
> (2) The Commission is empowered and directed to prevent persons, partnerships, or corporations [with exceptions not relevant here] from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

Petitioners seek review of the Commission's order as authorized under §5(c) of the Act, 15 U.S.C. §45(c).

2. The Commission's staff counsel goes by the title of counsel supporting the complaint or Complaint Supporting Counsel. She proposed in the draft (Cont'd)

Appendix A

(Part I, Paragraph 6) prohibits petitioners from "[r]epresenting the safety or performance of any product unless such claims are fully and completely substantiated by a reasonable basis which shall consist of competent and objective material available in written form."

The attack on this paragraph — the arguments tend to overlap — is that it improperly shifts the burden of proof to petitioners in a possible future false or deceptive advertising charge; is beyond the Commission's statutory power under Section 5(a)(1) of the Act, 15 U.S.C. §45(a)(1); is too broad for purposes of injunctive relief; is unduly burdensome as well as vague and indefinite; was reached by "*ad hoc* adjudication" rather than by rule-making; and is an unconstitutional interference with and prior restraint on Free Speech. We are not persuaded by any of the arguments advanced, but we do rephrase the order in the interest of clarity.

(Cont'd)
order accompanying the complaint (under Federal Trade Commission Rules, 16 C.F.R. §3.11(b)(3) where practical the proposed order is a part of the complaint) that petitioners be prohibited from

> Representing the safety, efficacy, performance, content or any other characteristic of any product unless such claims are fully and completely substantiated by a reasonable basis which shall consist of competent scientific tests and such substantiation material is available to the public. In cases where respondent can show that no competent scientific test can substantiate the claim, a reasonable basis shall consist of other competent objective material.

The administrative law judge modified the proposed order to read:

> Representing the safety, efficacy, performance, content, or any other characteristic of any product unless such claims are fully and completely substantiated by a reasonable basis which shall consist of competent objective material and substantiative material is available to the public.

The Commission in turn modified the administrative law judge's order to read as set forth in text.

Appendix A

I. FACTS

Petitioner Jay Norris, Inc. (Norris), has done business for twenty-five years by mail-order catalogues and advertisements in national newspapers like the New York Times and magazines like TV Guide. The instant proceeding, Norris's third before the Federal Trade Commission (FTC or Commission) within fifteen years,[3] involved false and deceptive advertising claims made as to efficacy, performance, and safety in connection with six widely varying products — (1) a propane "flame gun" that would "dissolve the heaviest snow drifts, whip right through the thickest ice"[4]; (2) roach powder that was "completely safe to use" and "never loses its killing power—even after years"[5]; (3) an "electronic miracle" that makes "your home wiring a huge [TV or FM radio] antenna for super reception"[6]; (4) a "5-year"

3. The first FTC proceeding against petitioners ended in a consent order prohibiting various misrepresentations of vitamins and vitamin-mineral preparations. *Jay Norris Co.*, 68 FTC 702 (1965). The second proceeding was an adjudication of violations because of petitioners' misrepresentations of wholesaling and wholesale prices. *Federated Nationwide Wholesalers Service v. FTC*, 387 F.2d 253 (2d Cir. 1968).

In addition, Jay Norris has been subjected to orders of the United States Postal Service as well as the New York State Bureau of Consumer Frauds and Protection. After a hearing by an administrative law judge, the Postal Service determined that Norris was engaged in a scheme or device for obtaining money or property through the mail by means of materially false representations in connection with its Lincoln-Kennedy penny, one of the same items that was at issue here. The Postal Service's Judicial Officer entered an order on February 27, 1974, limiting the postal services thereafter available to Norris. Norris has also agreed with the New York consumer protection agency in an Assurance of Discontinuance dated June 30, 1976, that it would cease and desist from representing simulated or imitation substances as genuine or natural.

4. According to expert testing and consumer testimony, it did neither.

5. It was neither safe nor so deadly.

6. It does not.

Appendix A

flashlight that carries an "absolute 5-year guarantee"[7]; (5) a "minted" Lincoln-Kennedy Commemorative" penny accompanied by a free "Plaque of Coincidences"[8]; and (6) "carefully maintained" cars "in regularly maintained fleet use. . .thoroughly serviced."[9] The quotations are selective and are by no means inclusive of the falsity and deception that the advertising blurbs relating to these six products display.

Both the administrative law judge and the Commission itself gave careful attention to the petitioners' arguments attacking the order originally proposed with the complaint by the complaint counsel, and each in turn modified that proposal. *See* note 2, *supra*. In supporting the breadth of the order entered, the administrative law judge and Commission each relied on cases upholding somewhat similar orders requiring objective substantiation for scientific claims but involving discrete products, *e.g., Fedders Corp. v. FTC*, 529 F.2d 1398 (2d Cir.) (air conditioners), *cert. denied*, 429 U.S. 818, 97 S.Ct. 63, 50 L.Ed.2d 79 (1976); *Firestone Tire & Rubber Co. v. FTC*, 481 F.2d 246 (6th Cir.) (tires), *cert. denied*, 414 U.S. 1112, 94 S.Ct. 841 38 L.Ed.2d 739 (1973); the Commission also relied on its case which held that that representations of objective product characteristics made without substantiation are for that reason deceptive. *National Dynamics Corp.*, 82 FTC 488, 559-60 (1973), *aff'd in pertinent part*, 492 F.2d 1333 (2d Cir.), *cert. denied*, 419 U.S. 993, 95 S.Ct. 303, 42 L.Ed.2d 265 (1974). The Commission

7. The manufacturer's guarantee was for five years' *or* ten hours' use.

8. There is no such official penny; and the item offered for sale has no numismatic or historical significance, is not "commemorative," and was never "minted." The "Plaque" was not free.

9. The cars, no longer sold, were former New York City taxicabs, and many owners had nothing but trouble with them.

further pointed out that the order's substantiation requirement related only to safety and performance (efficacy) claims, not other characteristics, although the order, as in *American Aluminum Corp.*, 84 FTC 21 (1974), *aff'd*, 522 F.2d 1278 (5th Cir. 1975), covers all of petitioners' products. The Commission also referred to petitioners' history of violations and noted that the deceptive advertising here covered products widely varying in price and use, making product coverage of the order incapable of limitation to a narrow subgroup.[10]

II. DISCUSSION

A. Shift in the Burden of Proof

Petitioners contend that the requirements of full and complete substantiation prior to its representation of the safety and performance of any product evidences an "explicit intention . . . to relieve the Commission of its burden of proving any alleged falsity of safety or performance representations made by Petitioners for any product." There is no doubt that the Commission has the burden of proof in administrative proceedings precedent to the issuance of a cease and desist order; petitioners correctly cite to Section 4(d) of the Administrative Procedure Act, 5 U.S.C. §556(d), and the

10. The Commission's opinion observed at footnote 35:

> No logical sub-grouping of respondents' products is suggested as a basis for limiting product coverage and there appears to be none. Respondents' products generally, like the one involved in this case, vary tremendously in price and use. In any event, this record demonstrates that respondents' penchant for misrepresentation of performance is not confined to a narrow sub-group of products they sell.

Commission's Rules of Practice for Adjudicative Proceedings, 16 C.F.R. §3.43(a), in support of this principle.[11]

The precise claim, however, is that the practical effect of the Commission's order brings about a shift of burden of proof in a subsequent proceeding in a federal district court under Section 5(*l*), 15 U.S.C. §45(*l*), to enforce a cease and desist order. For example, petitioners say, if they advertise Brand X as 100% effective, the Commission may, utilizing the order, challenge the claim as without substantiation, without regard to whether the representation is true or false; and once the Commission raises this challenge petitioners would have the burden of producing "competent and objective material available in written form" to rebut the charge.

This court in *Federated Nationwide Wholesalers Service v. FTC*, 398 F.2d 253 (2d Cir. 1968), held that the shifting of the Commission's burden in a subsequent enforcement proceeding was impermissible. *But see S. S. S. Co. v. FTC*, 416 F.2d 226, 229 (6th Cir. 1969). However, it was the specific wording of the order at issue in *Federated* that brought about the shift. In *Federated*, the Commission's order coupled an express prohibition against a seller's representation that it was a wholesaler or sold merchandise at wholesale prices with a proviso that the seller would have a "defense" in any enforcement proceeding if the seller made substantial sales to retailers or if the prices did not exceed the prices paid by retailers. But one obvious problem with the order was that it did not take into account the evidence in the record that "40% of the . . . sales [we]re made to retailers and [we]re therefore wholesale

11. The cited statute and Rules of Practice relate not to the enforcement of remedial orders in the courts but to the burden of proof in administrative proceedings to determine a statutory violation, a distinction pointed out in *United States v. J. B. Williams Co.*, 498 F.2d 414 (2d Cir. 1974), at 441-45 (dissenting opinion).

transactions," *id.* at 259 (emphasis added); in these cases the seller's representations fell within the first part of the proviso and could not properly have been the basis for any enforcement proceeding, no matter who had the burden of proof. Another problem with the order is more relevant to the specific challenge that Norris raises with regard to the burden of proof. By absolutely prohibiting the representations and allowing a defense, "the Commission [decreed] what in effect [wa]s clearly a shifting of the burden of proof from itself to petitioners," which the court held was unwarranted. *Id.* at 260.[12]

Federated obviously does not stand for the proposition that every FTC order containing a prohibition amounts to a shift in the burden of proof. The court noted, 398 F.2d at 260, that the Seventh Circuit in *Western Radio Corp. v. FTC,* 339 F.2d 937, 940 (7th Cir. 1964), *cert. denied,* 381 U.S. 938, 85 S.Ct. 1770, 14 L.Ed.2d 701 (1965), had reviewed an order requiring the manufacturer to cease and desist from making certain statements about the merits of its product unless it established that the claims were true. The Seventh Circuit, in rejecting the argument that the order shifted the burden of proof construed the order as only prohibiting false advertising and noted in dictum that it did not anticipate that a court in an enforcement proceeding would regard the order as having shifted the burden of proof. The court in *Federated* was careful to point out that it reached the issue of the burden of proof only because the order that it was reviewing was "too explicit to be subject to a validating interpretation." 398 F.2d at 260. And the *Federated* court in fact

12. The court acknowledged the Commission's "broad discretion" under *FTC v. Colgate-Palmolive Co.,* 380 U.S. 374, 392, 85 S.Ct. 1035, 13 L.Ed.2d 904 (1965), and agreed that "'those caught violating the Act must expect some fencing in.' *FTC v. National Lead Co.,* 352 U.S. 419, 431, 77 S.Ct. 502, 1 L.Ed.2d 438 (1957)." *Federated Nationwide Wholesalers Service v. FTC,* 398 F.2d 253, 260, (1968).

approved an order prohibiting the seller from representing that it was a wholesaler or sold at wholesale prices unless it made a substantial and significant number of sales to retailers and sold at prices generally paid by retailers. *Id.*

It is thus apparent that this case is different from *Federated* and that the perceived shift in the burden of proof in that case is not involved here. Here there is no defense carved out by way of proviso from an absolute and overinclusive prohibition, the express wording of which in *Federated* compelled the court to find a shift in the burden of proof. The order here is for all practical purposes of the same form and effect as the order approved in *Western Radio Corp.* and the order as modified in *Federated;* it is not at all like the order struck down in *Federated* (even though, we note, upheld in *S.S.S. Co., supra*). We find no explicitness preventing "a validating interpretation"; rather, we agree with the Seventh Circuit that a court in an enforcement proceeding would recognize no shift in the burden of proof.

Norris asserts that

> [w]ithout the slightest change in its meaning or impact of the words being used, the order in the instant case might just as well use the words that Petitioner shall cease and desist from:
>
> > "[m]aking representations as to the safety or performance of any product; provided, however, that it shall be a defense in any enforcement proceeding under this order for petitioners to show:
> >
> > (a) that such claims are fully and completely substantiated by a reasonable basis and

> (b) that such reasonable basis consists of competent and objective material available in written form."

But the "change in . . . meaning or impact of the words being used" is the very difference between the Commission's order in *Federated,* which the court held was impermissible, and the order that the court itself in *Federated* imposed. Under the order in the instant case, the Commission has the burden of showing in a civil penalty proceeding in federal district court both (1) that Norris made a safety or performance representation and (2) that it lacked adequate substantiation at the time that it made the advertising claim. Under the Norris version above the Commission would only have to show that Norris made the claim. Norris's failure, if any, to comply with the requirement of prior substantiation is part of the Commission's case; compliance is not part of Norris's case by way of defense.

To the extent that any such requirement imposes a burden, it is more akin to a burden of production than a burden of proof. The issue is whether the order as a whole is reasonable in light of the Commission's findings and its broad remedial powers. *See* note 12 *supra.* As we stated recently in *ITT Continental Baking Co. v. FTC,* 532 F.2d 207, 220-21 (2d Cir. 1976):

> "[T]he Commission has a wide discretion in its choice of a remedy to 'cope with the unlawful practices' disclosed by the record," *Fedders Corp. v. FTC,* 529 F.2d 1398, 1401 (2 Cir. 1976), quoting *FTC v. Mandel Bros. Inc.,* 359 U.S. 385, 392, 79 S.Ct. 818, 3 L.Ed.2d 893 (1959), and . . .
>
> "[s]o long as the remedial order is reasonably related to the unlawful practices found to exist, the Commission's order should be upheld." *Fedders, supra,* at 1402.

See also Chrysler Corp. v. FTC, 182 U.S. App. D.C. 359, 366, 561 F.2d 357, 364 (1977). To that question we now turn.

B. The Commission's Statutory Power

Petitioners, perhaps in another way of making their first point, argue that the order is beyond the Commission's statutory power because Section 5(a)(1) of the Act, 15 U.S.C. § 45(a)(1), relates only to "unfair or deceptive acts" and does not define violations with respect to prior substantiation and lack of substantiation for the assertion made. Thus, if a representation is true, the argument runs, no one is deceived or treated unfairly by the mere lack of prior substantiation. But cases both without and within this circuit have held otherwise in situations where a seller or manufacturer has misrepresented safety or performance. The Sixth Circuit has upheld an order prohibiting representations as to tire performance or safety characteristics "unless each such characteristic [is] fully and completely substantiated by competent scientific tests." *Firestone Tire & Rubber Co. v. FTC, supra,* 481 F.2d at 250. This court has upheld an order prohibiting claims as to the air cooling, dehumidification, and circulation performance characteristics of air conditioners unless the manufacturer "has a reasonable basis for such statement or representation, which shall consist of competent scientific, engineering or other similar objective material or industry-wide standard based on such material." *Fedders Corp. v. FTC, supra,* 529 F.2d at 1400-01. And we followed *Fedders* in spirit with *ITT Continental Baking Co. v. FTC, supra,* 532 F.2d at 220-21, even though we there limited an order that prohibited representations as to "nutritional properties . . . unless the advertised nutritional value can be substantiated for the average and ordinary use of the product by consumers." But the ground of modification was that the order was not reasonably related to the misrepresentation charged, and *ITT* is not a limitation on the FTC's power to require prior

substantiation in a proper case as a reasonable remedy for specific deception practiced. *See also National Dynamics Corp. v. FTC, supra,* 492 F.2d at 1336.

In each case, of course, the prohibitions of the remedial order must bear a reasonable relationship to the deceptive acts found. Because there is no question that Norris wrongfully made safety and performance representations in the past, the requirement of prior substantiation is properly imposed in the remedial order as reasonably calculated to prevent violations of the sort found to have been committed. The requirement is not imposed as an additional burden on petitioners in respect to their truthful claims; rather it prohibits only claims that they cannot substantiate even while it permits continued advertising on the basis of all truthful, objectively substantiated claims.

We agree with the FTC that its order is a "mere recogni[tion] that Jay Norris is in a better position than consumers to evaluate safety and performance claims for products sold by it and that, given the proven predilection of Jay Norris to misstate these characteristics, the company [may] henceforth be required to have a reasonable basis for such claims." In fact, as the Commission has pointed out, the obligation that it imposes on Norris is "no greater than is required of all advertisers under Section 5." It is merely more explicit. As a proper remedy for past violations, this much we leave and must in the nature of the administrative procedure to the agency's expertise and sound discretion.

C. The Order's Breadth and Definiteness of Terms

Petitioners argue, nevertheless, that this order is too broad because it covers all of the myriad of its products when only six

were shown to have been deceptively represented.[13] Petitioners also contend that the order is too vague and imprecise.

The broadness attack can be dealt with quickly. First, the order covers only safety and performance representations, the specific characteristics that petitioners are wont to exaggerate. *See* note 2 *supra.* Second, as to the order's coverage of items other than those as to which deception has been specifically found, it is well settled that this agency, like others, may fashion its relief "as a prophylactic and preventive measure," *FTC v. Mandel Brothers, Inc.,* 359 U.S. 385, 392-93, 79 S.Ct. 818, 824, 3 L.Ed.2d 893 (1959), to restrain other similar or related acts, at least where the misrepresentations have been so extensive and so substantial in number. Where misrepresentation is "not restricted to an isolated instance but [is] found in numerous advertisements . . . courts have often upheld FTC orders encompassing all products or all products in a broad category, based on violations involving only a single product or group of products." *ITT Continental Baking Co. v. FTC, supra,* 532 F.2d at 223 (collecting cases). In this case, "all product" coverage is particularly appropriate because the six particular products specifically mentioned in the complaint are random samplings of Norris's inventory, *see* note 10 *supra,* which is constantly changing and which petitioners could manipulate to avoid the substantiation requirement if the order were directed only against specific products. As the Supreme Court said in *FTC v. Colgate-Palmolive Co.,* 380 U.S. 374, 395, 85 S.Ct. 1035, 1048, 13 L.Ed.2d 904 (1965), "it [is] reasonable for the Commission to prevent . . . similarly illegal practices in future advertisements." So, too, in tailoring a remedial order to fit future proclivities, the Commission may take into account petitioners' past history of noncompliance. *See Motion Picture Studio Mechanics, Local 52 v. NLRB,* 593 F.2d 197, 200-01 (2d Cir. 1979), *following*

13. Because the complaint was limited to these six items, the Commission's counsel was prevented by the administrative law judge from introducing evidence as to other items.

NLRB v. Express Publishing Co., 312 U.S. 426, 436-37, 61 S.Ct. 693, 85 L.Ed. 930 (1941); *see also* K. Davis, *Administrative Law Treatise* §8.19 (1958 & 1970 Supp.).

Petitioners' argument that the order is vague and imprecise must stand or fall with the same arguments regarding the relationship of the order to the unlawful practices found. Thus, although the Supreme Court quoted from cases holding that "an order's prohibitions 'should be clear and precise in order that they may be understood by those against whom they are directed,'" especially because of the severe penalties to which violators may be subject, *citing FTC v. Cement Institute*, 333 U.S. 683, 726, 68 S.Ct. 793, 92 L.Ed. 1010 (1948), and *FTC v. Henry Broch & Co.*, 368 U.S. 360, 367-68, 82 S.Ct. 431, 7 L.Ed.2d 353 (1962), the Court reiterated in the same breath that "it does not seem 'unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line.'" *FTC v. Colgate-Palmolive Co., supra*, 380 U.S. at 392-93, 85 S.Ct. at 1046, *quoting from Boyce Motor Lines, Inc. v. United States*, 342 U.S. 337, 340, 72 S.Ct. 329, 96 L.Ed. 367 (1952). The Court in *Colgate* implied that justified broadness did not make an order too vague; and as noted above, it upheld an order prohibiting similar practices with respect to *any* product that the company advertised.

Petitioners' vagueness fears can be assuaged by resort to the Commission's rules.

> If . . . a situation arises in which [petitioners] are sincerely unable to determine whether a proposed course of action would violate the present order, they can, by complying with the Commission's rules, oblige the Commission to give them definitive advice as to whether their proposed action, if pursued, would constitute compliance with the order.

Colgate-Palmolive, supra, 380 U.S. at 394, 85 S.Ct. at 1047 (footnote omitted). *Accord, Fedders Corp. v. FTC, supra*, 529 F.2d at 1404; *see* 16 C.F.R. §3.61(d).

D. The Use of Adjudication in Lieu of Rulemaking

In reliance on *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 89 S.Ct. 1426, 22 L.Ed.2d 709 (1969), petitioners maintain that the present order is in reality a disguised form of rulemaking intended to have general applicability. The *Wyman-Gordon* case, however, turned on a much different set of circumstances. The procedure challenged there was that the agency was relying on a "rule" that it had announced in an earlier unrelated adjudicatory proceeding in which the NLRB invited employer groups and trade unions to submit briefs as amici curiae and imposed only prospective application of the procedure adopted. The plurality held that the procedure could not be applied to Wyman-Gordon as a rule of general applicability because it had been set forth not by rulemaking but by adjudication. There is no such conduct in the present proceedings, and petitioners completely miss the holding of *Wyman-Gordon* that in fact sustained the NLRB's application to the company in the context of the adjudicatory proceeding against the company of the very procedure invalidated as a rule of general applicability. The procedure, although not a rule of agency practice because of non-compliance with rulemaking requirements, was nevertheless a valid order specifically directed against the company. Norris was similarly involved in an adjudicatory proceeding with an agency whose order against it is properly imposed in that context.

Norris also argues that the Commission should not apply a standard of prior substantiation unless it undertakes to do so "by a proposed industry-wide rule applicable to representations made by all companies in the industry, in accordance with the rule-making machinery provided by Congress." In the absence of

an abuse of discretion in the particular case, however, the agency is not required to proceed by rulemaking rather than adjudication. *Wyman-Gordon* did not alter the established rule that "the choice between rulemaking and adjudication lies in the first instance in the [agency's] discretion." *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294, 94 S.Ct. 1757, 1771, 40 L.Ed.2d 134 (1974). In light of the number and severity of Norris's violations as well as its past history of violations, the Commission has adequately supported its decision to proceed against Norris by adjudication, and it properly imposed the requirement of prior substantiation in its discretion in fashioning a remedy. As the Commission correctly points out in its brief, "a demonstrated violator may appropriately be fenced in by being put to a duty somewhat greater than the Act may require of the world at large." "[T]hose caught violating the Act must expect some fencing in." *FTC v. National Lead Co.*, 352 U.S. 419, 431, 77 S.Ct. 502, 510, 1 L.Ed.2d 438 (1957). *See* note 12 *supra*.

E. First Amendment Considerations

Petitioners' final attack on the Commission's order is based on the line of recent Supreme Court cases extending the protections of the First Amendment to commercial speech.[14]

14. The cases include *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973) (commercial advertising protected, but specific bar to sex-designated want ads upheld); *Bigelow v. Virginia*, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975) (advertisement of abortions referral agency not subject to criminal punishment); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) (holding unconstitutional statute that declared advertising of prices of prescription drugs by licensed pharmacist to be unprofessional conduct); *Linmark Associates, Inc. v. Willingboro*, 431 U.S. 85, 97 S.Ct. 1614, 52 L.Ed.2d 155 (1977) (ordinance prohibiting real estate "For Sale" or "Sold" signs, ostensibly to prevent "white flight," held unconstitutional); *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977) (routine legal services may

(Cont'd)

Petitioners argue that the order runs afoul of First Amendment prohibitions, or at the very least amounts to a prior restraint, because it reaches even truthful speech if not substantiated.

The use of the requirement of substantiation as regulations is clearly permissible. Commercial transactions are still subject to governmental regulation, *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 455-56, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978); and false or misleading commercial advertising does not have the same protections that similar noncommercial speech may have. *See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976); *see also Ohralik, supra*. Untruthful commercial speech, or even deceptive or misleading commercial speech, is clearly subject to restraint. *Bates v. State Bar of Arizona*, 433 U.S. 350, 383, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977); *Virginia State Board, supra*. Only because of petitioners' business practices is truthful speech indistinguishable from deceptive speech except by reference to reasonable substantiation for the representations. Petitioners can be constitutionally required to make the distinction obvious in this way.

Even since the briefs in this case were filed, the Supreme Court, on the basis that "restrictions on false, deceptive, and misleading commercial speech" are "permissible," upheld a Texas statute prohibiting the practice of optometry under an assumed name, trade name, or corporate name. *Friedman v. Rogers*, ___ U.S. ___, ___, 99 S.Ct. 887, 894, 59 L.Ed.2d 100

(Cont'd)

be advertised). *See also Beneficial Corp. v. FTC*, 542 F.2d 611 (3d Cir. 1976), *cert. denied*, 430 U.S. 983, 97 S.Ct. 1679, 52 L.Ed.2d 377 (1977) (overturning FTC ban on "Instant Tax Refund" advertising).

See Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 Harv.L.Rev. 661, 671-73 (1977).

(1979). The FTC is charged by Congress with the duty of protecting consumers from the deceptive and misleading use of commercial speech or advertising, a substantial and, to use the Supreme Court's phrase in *Friedman*, "well-demonstrated," *id.* at ___, 99 S.Ct. 887, interest made national under the Commerce Power. The instant order does no more, and it may even do less, than the Texas statute in *Friedman*, in imposing conditions to avoid deceptive commercial speech; as such it does not infringe the First Amendment. The prohibition in *Friedman* was a total ban on a business practice or form of advertising because of the potential for deception; the prohibition here is only of actually unsubstantiated safety and performance advertising claims for which Norris has shown a marked predisposition. Petitioners must accordingly help enable the public to tell the truthful from the false.

Under traditional First Amendment doctrine, the issue of prior restraint would still remain. We note, however, that even as the Supreme Court held certain commercial speech protected from absolute prohibition, it has seen fit to comment twice already in the short life of First Amendment protection for commercial speech that the doctrine of prior restraint may be inapplicable. *See Friedman, supra,* ___ U.S. at ___ & n. 9, 99 S.Ct. 887; *Virginia State Board, supra,* 425 U.S. 771 n. 24, 96 S.Ct. 1817, 48 L.Ed.2d 346. On this open question we hold only that because the FTC here imposes the requirement of prior substantiation as a reasonable remedy for past violations of the Act, there is no unconstitutional prior restraint of petitioners' protected speech.

III. MODIFICATION

Although we reject petitioners' attacks on the Commission's order, we rephrase the order in the interest of clarity. We find the order as it comes to us ungrammatical as well as badly worded. We modify it to prohibit petitioners from representing

the safety or performance characteristic(s) of any product unless petitioners have a reasonable basis for the representation(s) consisting of competent and objective material, available in written form, that fully and completely substantiates such representation(s).

As modified, enforcement granted. Motion of the parties dated February 21, 1979, for modification of the order of the FTC granted.

APPENDIX B — OFFICIAL REPORT OF ADMINISTRATIVE PROCEEDINGS 91 F.T.C. 751 *ET SEQ.*

IN THE MATTER OF

JAY NORRIS CORP., ET AL.

ORDER, OPINION, ETC., IN REGARD TO ALLEGED VIOLATION OF THE FEDERAL TRADE COMMISSION ACT

Docket 9054. Complaint, Sept. 3, 1975—Final Order, May 2, 1978

This order, among other things, requires a Freeport, L.I., N.Y. mail-order house to cease misrepresenting, in the advertising and sale of consumer products, that dissatisfied customers will receive prompt refunds; and that exchanges and refunds are expeditiously processed; that all parcels are insured against loss or damage; and that non-delivery is caused by the United States Postal Service. The order requires that purchases be shipped within time periods specified, and in the event of shipping delays, customers must be offered the option of consenting to the delays or cancelling their transactions. The firm is further obligated to honor such cancellations and to make proper refunds in a timely manner. The order further prohibits the company from making false or unsubstantiated claims regarding the characteristics, efficacy, performance, safety, and value of its consumer products. Additionally, the order requires the corporation and the Pan-Am Car Distributors Corp., both engaged in the advertising and sale of used motor vehicles, to cease misrepresenting that their vehicles have been inspected and repaired in preparation for delivery to purchasers; or that they are in a safe mechanical and operation condition and will render normal, adequate and satisfactory service.

Allegations of the complaint are dismissed as to Federated Nationwide Wholesalers Service, Garydean Corp., t/a Nationwide Wholesalers Service, and P-N Publishing Company, Inc.

Appearances

For the Commission: *Irving C. Koch* and *Sol Grand.*

For the respondent: *Robert Ullman, Bass, Ullman & Lustigman,* New York City.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Jay Norris Corp., Federated Nationwide Wholesalers Service, Garydean Corp., a corporation trading as Nationwide Wholesalers Service, P-N Publishing Company, Inc., a corporation, Pan-Am Car Distributors Corp., a corporation and Joel Jacobs, Mortimer Williams and Kenneth Mann, individually and as officers of said corporations, hereinafter referred to as the respondents, have violated the provisions of said Act, and it appearing to the Commission that a proceeding by it in

Appendix B

respect thereof would be in the public interest, hereby issues its complaint, stating its charges in that respect as follows:

I. RESPONDENTS

PARAGRAPH 1. Respondents Jay Norris Corp., Federated Nationwide Wholesalers Service, Garydean Corp., trading as Nationwide Wholesalers Service, [2] P-N Publishing Company, Inc., and Pan-Am Car Distributors Corp. are corporations organized, existing and doing business under and by virtue of the laws of the State of New York, with their principal offices and place of business located at 31 Hanse Ave., Freeport, Long Island, New York.

Individual respondents Joel Jacobs and Mortimer Williams are officers of said corporations. Kenneth Mann is an officer of Pan-Am Car Distributors Corp. They formulate, direct and control the acts and practices of the corporate respondents including the acts and practices hereinafter set forth. Their business addresses are the same as that of the corporate respondents.

II. NATURE OF RESPONDENTS' BUSINESS

PAR. 2. Respondents are engaged in the advertising, offering for sale, sale and distribution of numerous articles of merchandise by mail order which they offer through newspaper, magazine, and catalog advertisements, including roach powder, TV antennas, socks, flashlights, flame guns, jewelry, books, girdles, watches, home furnishings, cheeses, ex-taxis sold as used cars and numerous other articles of merchandise.

PAR. 3. Respondents in the course and conduct of their business have been and are now engaged in the advertising, offering for sale, sale and distribution of merchandise which they ship or cause to be shipped when sold, from the State of New York to purchasers located in various other States of the United States or directly from manufacturers and distributors located in various other States to purchasers located throughout the nation, and have maintained a substantial course of trade in said merchandise in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act.

PAR. 4. Respondents are now, and at all times mentioned herein have been, in substantial competition in commerce with other corporations, [3] firms and individuals engaged in the sale and distribution of products of the same general kind and nature as those sold by respondents.

Appendix B

III. ACTS AND PRACTICES – REPRESENTATIONS

PAR. 5. In the course and conduct of their business, and for the purpose of inducing the purchase of their products, respondents have made statements and representations in the advertising, offering for sale, sale and distribution of their products through flyers, catalogs, brochures and advertisements published in mail order catalogs and national newspapers and magazines.

PAR. 6. The statements and representations made as alleged in Paragraph Five hereof, include statements regarding respondent's guarantees, deliveries and refunds. Typical and illustrative, but not all inclusive, of statements and representations with respect to their guarantees, deliveries and refunds, are the following:

30-DAY MONEY-BACK GUARANTEE Mail No-Risk Coupon Now

ORDER BY MAIL WITH CONFIDENCE 30-DAY MONEY-BACK GUARANTEE

30-DAY MONEY-BACK GUARANTEE ON ALL PURCHASES

30-DAY MONEY-BACK GUARANTEE ON ALL PURCHASES CHRISTMAS DELIVERY GUARANTEED IF YOU ORDER NOW

BUY WITH CONFIDENCE! If not delighted, return your order within 30 days for refund of full purchase price

MONEY-BACK IF NOT DELIGHTED-SEND CHECK OR MONEY ORDER

ORDER NOW PROMPT DELIVERY GUARANTEED

"PERSONAL CHECKS" To insure immediate shipment of your order, please have your check certified. [4] Otherwise, allow about 2 weeks until your check clears your bank

Satisfaction guaranteed or money refunded

YOUR GUARANTEE OF SATISFACTION. . .Everything you buy from JAY NORRIS CORP. is ALWAYS FIRST QUALITY. Any item not up to your expectations return in 30 days for full refund.

Unless item is marked express collect, use this easy chart to figure postage insurance, shipping and handling charges. It's only part of the delivery cost-we pay the rest.

-If Your Order Is- up to	
$15.00	add $1.70
$15.01 to $20.00	add $2.20
$20.01 to $30.00	add $3.20
$30.01 to $40.00	add $4.20
$40.01 to $50.00	add $5.20
$50.01 to $60.00	add $6.00
over $60.00	add $7.20

Appendix B

DIRECT FACTORY SHIPMENT:
Some items in this catalog are shipped direct from the factory. Such shipments are sent to you Parcel Post, Express Collect or Freight Collect, depending on weights

REFUND: If for any reason, there is a refund due you after your order has been filled, we will send you such refund promptly.

SHIPPING INFORMATION:
Orders are usually filled within 24 hours of receipt (with the exception of factory shipments). . .Allow 1 to 3 weeks for factory shipments to reach you . . .

Dear Customer:

Because you did not receive your order, we must assume that it was lost in the mails. [5]

If you will be kind enough and return all these papers together with the original or photostatic copy of your check or money order, showing that it was cashed by us, a tracer will be placed and if necessary, a duplicate shipment will be made.

Please give us full details and information pertaining to the merchandise, such as size, color, price, style number, etc.

We regret any inconvenience we may have caused you. Thank you for your cooperation.

Very truly yours,
JAY NORRIS CORP.

PAR. 7. Through the use of the statements and representations alleged in Paragraph Six hereof, and others of similar import and meaning, respondents have represented, and are now representing, directly or by implication, that:

1. Merchandise paid for by a certified check is shipped to purchasers immediately.
2. Merchandise paid for by a non-certified check is shipped to purchasers about two weeks after said check has been approved for payment at the purchaser's bank.
3. The full purchase price of the product plus all additional charges paid by the purchaser in connection with said purchase are refunded by respondents if the purchaser is dissatisfied for any reason.
4. A sum of money in the form of cash, check, money order or other negotiable currency is refunded to purchasers if they are dissatisfied for any reason.
5. Pursuant to respondents' 30-day money back guarantee, purchasers will receive a full refund if the merchandise is returned to respondents within 30 days from the date of the purchaser's receipt of said merchandise. [6]
6. In a substantial number of cases, the non-delivery of the

purchaser's order, is caused by the loss of the merchandise by the United States Postal Service.

7. Purchasers of respondents' products pay only part of the delivery cost and the respondents absorb the remaining portion of said cost.

8. Exchanges or refunds are expeditiously processed by respondents.

9. All parcels shipped to purchasers, except those items marked express collect, are insured against loss, damage or other casualty by respondents.

PAR. 8. In truth and in fact:

1. In numerous instances, merchandise paid for by a certified check is not shipped to purchasers immediately. Delays of as long as one month to one year have been encountered.

2. In numerous instances, merchandise paid for by a non-certified check is not shipped to purchasers about two weeks after said check has been approved for payment at the purchaser's bank. Delays of as long as one month to one year have been encountered.

3. The full purchase price of the product, plus all additional charges paid by the purchaser in connection with said purchase, are not refunded by respondents if the purchaser is dissatisfied. Postage, handling, shipping and insurance claims are deducted by respondents from the full purchase price.

4. A sum of money in the form of cash, check, money order or other negotiable currency is not refunded to purchasers if they are dissatisfied for any reason. Respondents [7] give purchasers a credit certificate which must be used to purchase merchandise from the respondents or be returned to the respondents in order to receive a cash refund.

5. Pursuant to respondents' 30-day money back guarantee purchasers do not receive a full refund if the merchandise is returned to respondents within 30 days from the date of the purchaser's receipt of said merchandise.

6. In numerous instances, the non-delivery of the purchaser's order is not caused by the loss of the merchandise by the United States Postal Service. Rather, respondents have failed to ship the ordered merchandise.

7. In numerous instances, the respondents do not absorb a portion of the delivery cost. Purchasers of respondents' merchandise pay the full cost of delivery.

8. In numerous instances, exchanges or refunds are not expeditiously processed by respondents. Delays of many months have been

encountered and only after purchasers write to the respondents and to governmental authorities are refunds received.

9. All parcels shipped to purchasers except those items marked express collect, are not insured against loss, damage or other casualty by respondents.

Therefore, the statements and representations, alleged in Paragraph Six hereof, were, and are, unfair or deceptive.

PAR. 9. The statements and representations made as alleged in Paragraph Five hereof include statements and representations regarding the performance, efficacy and other characteristics of respondents' products. Typical and illustrative, [8] but not all-inclusive, of the statements and representations with respect to product performance, efficacy and other characteristics are the following:

FLAME GUN

NEW JN INSTA-JET PROPANE FLAME GUN THE WORK-SAVER THE HEART-SAVER LIGHTWEIGHT, EASY-HANDLING FASTEST WAY WE KNOW TO CLEAR AWAY ICE AND SNOW! . . . Whips through even the heaviest drifts. Clears walks and driveways. Routs Clogged gutters of ice and old leaves.

Thaws frozen pipes . . . . Produces a clean hot flame for up to 14 hours on a single propane cylinder-easily obtainable at hardware, paint and department stores . . .

Just aim The Flame Gun and watch it dissolve the heaviest snow drifts, whip right through the thickest ice . . . in seconds!

SOCKS

YOU'LL NEVER NEED TO BUY ANOTHER PAIR OF SOCKS AGAIN FOR THE REST OF YOUR LIFE. (unless your laundry loses them) . . . IMMEDIATE DELIVERY GUARANTEED

. . . indestructible nylon socks . . .

. . . Guaranteed to wear forever in normal use – that "normal use" simply means don't burn holes in them deliberately, or try to cut them with scissors or razor . . .

These revolutionary 8-ply nylon socks are made of yarn so indestructible we unconditionally guarantee to give you FREE replacement pair for pair – for any you ever wear a hole in! 6 pair only $7.98 12 pair for $14.98 [9]

ROACH POWDER

Get rid of roaches ONCE AND FOR ALL! SURE-KILL WIPES OUT ROACH NESTS OR YOU PAY NOTHING Roaches can't resist Sure-Kill. They devour its odorless white powder and crawl to their nests, where they die. Then, a deadly chain reaction

starts, that wipes out every roach and every egg in the nest. Sure-Kill is safe to use, and never loses its killing power-even after years. A single can cleans out 6 to 8 rooms

GUARANTEED ROACH-FREE FOR 5 YEARS. Sure-Kill roach killer is guaranteed by the manufacturer to prevent reinfestation for up to 5 years when used as directed and left in place.

UNCONDITIONAL GUARANTEE Our roach killer is guaranteed by the manufacturer to prevent reinfestation when used as directed and left in place or your money back

. . . Completely safe to use, and never loses its killing power-even after years. . .

TV ANTENNA

ELECTRONIC MIRACLE TURNS YOUR HOUSE WIRING INTO JUMBO TV ANTENNA. . .ONLY $1.99 – 2 for $3.65 now you can bring in every channel in your area sharp and clear without installing an expensive outdoor antenna or using unsightly rabbit ears. This simple little invention does the trick. You attach it easily and quickly to your TV set, then plug it into wall outlet. . .makes your home wiring a huge antenna for super reception . . .

Every home a super receiver ELECTRONIC MIRACLE [10] TURNS YOUR HOUSE WIRING INTO A JUMBO TV ANTENNA. . . .

. . .Do you know that you have one of the greatest TV antennas ever constructed? It's better than any set of rabbit ears, more efficient than complicated external antennas. It's your house. Yes, the wiring in your home constitutes a great antenna that acts as a super receiver for TV, FM, all kinds of difficult reception. . . .

FLASHLIGHT

NEW! 5 – YEAR FLASHLIGHT USED ON THE APOLLO MISSIONS DEVELOPED FOR AMERICA'S ASTRONAUTS Totally new and revolutionary power cell (developed and used by the government in manned moon flights) keeps this flashlight shining bright for at least 5 years with 10 times the staying power of an ordinary flashlight. No external switch to corrode or break. (NASA wanted a fool-proof switch for their flashlight going to the moon). Now you can have it for your car or home – YOUR COST $7.99, 2 for $14.99

ABSOLUTE 5 – YEAR GUARANTEE Every command modual flashlight carries this absolute 5 – year guarantee. Carry your flashlight with you, keep it at home. It must work even if you haven't touched it for 5 years or your money back. So don't be another minute without the one safety element every car, every family needs.

CARS

BUY CHOICE . . . NOT CHANCE Buy direct and get the carefully maintained car of your choice below wholesale price. All cars are standard four door, six passenger sedans equipped with automatic transmissions, heater, defroster and feature durable vinyl interiors. They have been in regularly maintained fleet use and serviced far more frequently than the average car owner can afford to do. Each car has been thoroughly serviced by our mechanics [11] to put it in good operating condition and passes careful inspection before being released for delivery. These top-quality ex-taxis

have been carefully selected for best value . . . We offer these fine cars at the prices shown (F.O.B., N.Y.) There are no hidden costs. . . .

IDEAL FOR PERSONAL USE OR TO RESELL AT A PROFIT!

1970 DODGE CORONET, AUTOMATIC TRANSMISSION $999.

1969 FORD CUSTOM DODGE CORONET, AUTOMATIC TRANSMISSION $799.

1969 CHEVROLET BISCAYNE, AUTOMATIC TRANSMISSION, $899.

Only Pan Am gives you this 100% o.k. checkout certificate. Dependable Pan Am gives you a good car at a low price. Our highly trained mechanics double-check each car for all the terms below. When a car leaves our premises it is checked out as follows:

Brakes	Fan Belt	Starter
Plugs	Spare Tire	Water Pump
Points	Jack	Fuel Pump
Lights	Transmission	Block
Battery	Heater	Color
Generator	Defroster	

MAIL THIS COUPON WITH YOUR DEPOSIT – ORDER AS MANY AS YOU WANT. ALL CARS ARE SOLD ON AN AS IS FIRST ORDER FIRST SERVE BASIS.

LINCOLN – KENNEDY PENNY

NOW AVAILABLE THE ONLY LINCOLN-KENNEDY PENNY EVER MINTED UNCIRCULATED COMMEMORATIVE LINCOLN HEAD PENNY WITH KENNEDY PROFILE Here's unusual news for collectors and anyone interested in unique commemorative issues. . .issues that may never be repeated again. A new uncirculated Lincoln Head penny is now available. This [12] unique coin shows the profile of President Kennedy stamped on the surface looking at President Lincoln. The relationship is uncanny. Never released for ordinary use, the coin is perfectly legal tender and is sanctioned by Section 332 of the U.S. Code. As a coin of both historical and numismatic significance it is certain to become a collector's item that will grow and grow in value. Because, however, this coin is not in circulation, you may obtain it only through an offering of this sort, and we urge you to order now, avoid disappointment. And if you order right away, you will also receive the Plaque of Coincidences showing the startling parallels in the career of these two tragic figures. . . . .

. . . These and many more astonishing coincidences are yours in your Free Plaque of Coincidential Facts when you order The Lincoln-Kennedy Commemorative Penny.

PAR. 10. Through the use of the statements and representations alleged in Paragraph Nine hereof, and others of similar import and meaning, respondents have represented and are now representing, directly or by implication that:

FLAME GUN

1. The "JN INSTA-JET PROPANE FLAME GUN" is able to whip through

the heaviest snow drifts and the thickest ice in seconds and is effective and efficient in clearing walks and driveways of ice and snow.

SOCKS

2. Respondents' nylon socks are indestructible.
3. Respondents' nylon socks last forever.

ROACH POWDER

4. Respondents' roach powder is safe to use.
5. Respondents' roach powder gets rid of roaches once and for all.
[13]
6. Respondents' roach powder creates a deadly chain reaction which eliminates and kills roaches and eggs.
7. The manufacturer has unconditionally guaranteed that respondents' roach powder prevents reinfestation when used as directed and left in place or it will refund money.
8. Respondents' roach powder does not lose its capacity to kill under any conditions of use.

TV ANTENNA

9. Respondents' TV antenna will bring sharp and clear reception even in difficult areas.
10. The performance of respondents' TV antenna is superior to any rabbit ear antenna or outdoor antenna.
11. Respondents' TV antenna will turn all types of house wiring into a TV antenna.
12. Respondents' TV antenna is an electronic miracle.

FLASHLIGHT

13. Respondents' "FIVE YEAR FLASHLIGHT" carries an absolute 5-year guarantee.

CARS

14. Cars delivered to purchasers are in good mechanical and physical condition.
15. Cars delivered to purchasers are in safe operating condition.
16. Cars delivered to purchasers are finished and look as pictured and described in respondents' advertising materials. [14]
17. Cars are checked by expert mechanics and necessary repairs are made prior to release for delivery.

18. Cars delivered to purchasers are in sound condition and repair and render normal, adequate and satisfactory service.
19. Respondents' cars may be readily resold by the purchasers at a profit.
20. Cars are regularly ordered and received in advance of their being offered for sale and are held in stock until purchase orders are received.
21. Respondents' cars have undergone thorough and complete servicing and inspection before being released and approved for delivery.
22. Each price quoted for respondents' motor vehicles is the full price and there are no hidden costs.
23. Respondents bear the liability and responsibility of delivery of cars to purchasers at any destination in the United States where such purchasers may reside.

LINCOLN-KENNEDY PENNY

24. Respondents' Lincoln-Kennedy penny was minted by the United States Treasury Department.
25. Respondents' Lincoln-Kennedy penny is a coin of historical and numismatic significance which is certain to grow in value.
26. The issuance of respondents' Lincoln-Kennedy penny was sanctioned by Section 332, Title 18, U.S. Code.
27. A free plaque containing historical coincidences between the lives of President Lincoln and President Kennedy is provided to purchasers with each coin order. [15]

PAR. 11. In truth and in fact:

FLAME GUN

1. The "JN INSTA-JET PROPANE FLAME GUN" is not able to whip through the heaviest snow drifts and the thickest ice in seconds and is not effective and efficient in clearing walks and driveways of ice and snow.

SOCKS

2. Respondents' nylon socks are not indestructible.
3. Respondents' nylon socks do not last forever.

ROACH POWDER

4. Respondents' roach powder is not safe to use. Ingestion of the powder may cause sickness or death.
5. Respondents' roach powder does not get rid of roaches once

and for all. The roach powder is a formulation of boric acid which works slowly. In many residential buildings cockroaches can reinfest before they are eliminated.

6. Respondents' roach powder does not create a deadly chain reaction which eliminates and kills roach and eggs. Each cockroach must contact the insecticide to be killed. Respondents' roach powder will not kill roach eggs.

7. The manufacturer has not unconditionally guaranteed that respondents' roach powder prevents reinfestation when used as directed and left in place or it will refund money.

8. Respondents' roach powder loses its capacity to kill under certain conditions of use. If wet, it cakes and does not adhere to the insects. If covered by grease or food deposits or non-insecticidal dusts, it becomes ineffective. [16]

TV ANTENNA

9. Respondents' TV antenna will not bring sharp and clear reception in difficult areas.

10. The performance of respondents' TV antenna is not superior to rabbit ear antennas or to outdoor antennas.

11. Respondents' TV antenna will not turn all types of house wiring into a TV antenna. If house wiring is encased in metal, it is shielded from the reception of any TV signals.

12. Respondents' TV antenna is not an electronic miracle.

FLASHLIGHT

13. Respondents' "FIVE YEAR FLASHLIGHT" does not carry an absolute 5-year guarantee. The flashlight is guaranteed by the manufacturer to store and remain usable for 5 years or to operate for a total of 10 hours, which ever comes first. The manufacturer further clearly states in its guarantee that the light will not stay "on" continuously for 5 years.

CARS

14. In a number of instances, cars delivered to purchasers are not in good mechanical and physical condition.

15. In a number of instances, cars delivered to purchasers are not in safe operating condition.

16. In a number of instances, cars delivered to purchasers are not finished and do not look as pictured and described in respondents' advertising materials. [17]

17. In a number of instances, cars are not checked by expert

mechanics and necessary repairs are not made prior to release for delivery.

18. Cars delivered to purchasers are not in sound condition and repair and do not render normal, adequate and satisfactory service.

19. Respondents' cars may not be readily resold by the purchasers at a profit.

20. In a number of instances, cars are not regularly ordered and received in advance of their being offered for sale and are not held in stock until purchase orders are received.

21. In a number of instances, respondents' cars have not undergone thorough and complete servicing and inspection before being released and approved for delivery.

22. In numerous instances, each price quoted for respondents' motor vehicles is not the full price and there are hidden costs. Purchasers are often required to expend large sums of money for the delivery of the cars or to enable cars to pass state motor vehicle registration safety or inspection requirements or to put cars into safe operating condition.

23. Respondents do not bear the liability or responsibility for delivery of cars to purchasers at any destination in the United States where such purchasers may reside.

LINCOLN-KENNEDY PENNY

24. Respondents' Lincoln-Kennedy penny was not minted by the United States Treasury Department. No branch of the United States Government had anything to do with the production of this coin. [18]

25. Respondents' Lincoln-Kennedy penny is not a coin of historical and numismatic significance which is certain to grow in value. It is a privately produced novelty item using an ordinary penny.

26. The issuance of respondents' Lincoln-Kennedy penny was not sanctioned by Section 332, Title 18, U.S. Code. Section 332 refers to the debasement of gold and silver coins by the physical removal or dimunition of the gold or silver content.

27. A free plaque containing historical coincidences between the lives of President Lincoln and President Kennedy is not provided to purchasers with each coin order. The ordinary paper card upon which the Lincoln-Kennedy penny is pasted is neither "free" nor is it a "plaque." Said card was never offered for sale by respondents at a regular price but was always offered for sale in conjunction with the penny.

Therefore, the statements and representations as alleged in Paragraph Nine hereof were, and are, unfair or deceptive.

IV. Acts or Practices – Failure To Disclose Material Facts

PAR. 12. In the further course and conduct of their business, as aforesaid, respondents have made statements and representations as aforesaid, without disclosing material facts. Such material facts include, but are not limited to, the following:

FLAME GUN

Initial purchase of respondents' flame gun does not include the propane cylinder mentioned in respondents' advertisements of its flame gun. The propane cylinder, which is an essential component of the flame gun, must be purchased at an additional cost. [19]

Respondents' flame gun is not assembled when delivered but rather must be assembled by purchasers after delivery.

ROACH POWDER

Respondents' roach powder is 50% boric acid and 50% inert ingredients.

Respondents' roach powder is hazardous. The product may be harmful to human beings and pets. Special precautions should be taken in the use of this product.

FLASHLIGHT

Respondents' flashlight has an on life of 10 to 20 hours.

Manufacturer's guarantee of respondents' flashlight is not absolute. The manufacturer guarantees that the light can be stored and remain usable for 5 years or operate for a total of ten hours, whichever comes first.

CARS

Respondents' cars are ex-New York City taxicabs.

Respondents' advertise that the cars are "FOB New York" and "As Is" without disclosing the import or meaning of those terms.

Respondents' cars are not inspected for compliance with any state motor vehicle inspection law.

Interiors of motor vehicles have not been cleaned or reconditioned by respondents prior to their being offered for sale.

Drivers hired to deliver cars to purchasers are independent contractors and are not respondents' agents, servants or employees.

The aforesaid material facts, if known to consumers would be likely to affect their consideration of whether or not to purchase

respondents' products. Therefore, the advertisements, acts or practices, which fail to disclose the aforesaid material facts are unfair or deceptive. [20]

V. Other Acts and Practices

PAR. 13. In the further course and conduct of their business as aforesaid respondents have:

(a) Deposited purchasers' checks and money orders into their bank accounts within three days to one week from receipt of such checks and money orders and have failed to either ship the merchandise ordered or to refund money for one month to one year;

(b) Failed to answer letters of inquiry from consumers or have made inadequate responses which have thereby delayed or prevented purchasers, seeking deliveries of merchandise or refunds of their money, from obtaining same;

(c) Failed to provide a business telephone listing in the official telephone directory for its location or in any published telephone directory and have maintained an unlisted business telephone number;

(d) Placed the burden of record keeping upon the purchasers who, upon seeking a refund, exchange, or delivery of the advertised merchandise ordered and paid for by them, have been required by respondents to provide copies of their cancelled checks, original order blanks or various correspondence received from respondents, as well as the full details pertaining to the merchandise ordered such as the size, color, price, style number and the date the order was placed;

(e) Utilized numerous corporate and business names such as Jay Norris Corporation, P.N. Publishing Corporation, Norris Nutrition, Garydean Corp., Federated Nationwide Wholesalers Service, Federated Wholesalers Service, Nationwide Service, Cheese[21]lovers International, Pan American Car Distributors Corporation, Associated Auto Wholesalers Corporation, American Value Corporation, and various other corporate and business names, post office box numbers and addresses, in such manner as to create confusion in the minds of purchasers who are unable to relate all the names used to the Jay Norris Corporation or to its principal owners.

Such business practices by respondents constitute unfair or deceptive acts or practices and unfair methods of competition in commerce in violation of Section 5 of the Federal Trade Commission Act.

PAR. 15. The use by respondents of the aforesaid unfair or deceptive representations, acts and practices has had, and now has,

the capacity and tendency to mislead members of the purchasing public into the erroneous and mistaken belief that said statements and representations were and are true and into the purchase of a substantial volume of respondents' products.

PAR. 16. The aforesaid acts and practices of respondents as herein alleged are all to the prejudice and injury of the public and of respondents' competitors, constitute unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in violation of Section 5 of the Federal Trade Commission Act.

INITIAL DECISION BY MILES J. BROWN, ADMINISTRATIVE LAW JUDGE

AUGUST 31, 1977

PRELIMINARY STATEMENT

The Federal Trade Commission issued its complaint in this matter on September 3, 1975 (mailed October 3, 1975), charging respondents with unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce in violation of Section 5 of the Federal Trade Commission Act, as amended, (15 U.S.C. 45). [2]

In their answer, respondents denied that they had violated the Federal Trade Commission Act as alleged in the complaint. They asserted that the individual respondents acted only in their capacity as corporate officers. They further asserted that the respondent corporations, other than J. Norris Corp. ("Norris") and Pan-Am Car Distributors Corp. ("Pan-Am"), had nothing to do with the matters which were the subject of the complaint.

Thereafter, for approximately ten months, there was sporadic pretrial discovery occasioned by several long continuances prompted by the fact that the complaint counsel originally assigned to this matter was concurrently handling another adjudicative matter on which she was the only Federal Trade Commission counsel of record. On July 6, 1976, complaint counsel filed a list of witnesses containing 140 names. On August 2, 1976, complaint counsel filed her 219 page list of Commission exhibits identifying 4236 numbered documents (many multi-paged) and not cross-referenced to the allegations of the complaint. Whereupon respondents' counsel moved for an extension of time until December 30, 1976, in which to file their witness and document lists, on the grounds that the "overwhelming volume of complaint counsel's avalanche of documents (not to mention the list

of 140 witnesses) represents extraordinary cause for this request." (Motion for Rescheduling of Dates . . ., dated August 17, 1976.)

On September 9, 1976, the administrative law judge issued an order requiring complaint counsel to file amended lists of proposed exhibits and proposed witnesses and otherwise vacated all other pretrial requirements therefore imposed on counsel. Shortly thereafter, other complaint counsel were assigned to this matter. On November 30, 1976, substitute complaint counsel filed their amended and abbreviated lists.

Adjudicative hearings commenced on January 11, 1977. Complaint counsel concluded their case-in-chief on February 1, 1977, utilizing 14 trial days. Respondents' answering case commenced February 28, 1977. On March 2, 1977, after three days of hearings, respondents' counsel advised that respondent Joel Jacobs, the only remaining witness for respondents, was incapaciated and he requested a continuance of the hearings. After several hearing dates were postponed, due to the continuing incapacity of Mr. Jacobs, the parties, on April 21, 1977, filed a stipulation consenting to the written testimony of Joel Jacobs, including questions and answers on direct examination, as well as on cross-examination. On April 28, 1977, [3] the administrative law judge approved the stipulation and directed that Mr. Jacob's written testimony be incorporated into the record.

On May 23, 1977, the administrative law judge was notified that the exhibits, which had remained in the New York Regional Office since the last hearing date of March 2, 1977, pending further hearings for presentation of Mr. Jacob's testimony, had been delivered to the Secretary's office. On June 1, 1977, the administrative law judge issued his order making certain corrections to the record, closing the record for receipt of evidence, and establishing due dates for filing of proposed findings and reply briefs.[1]

Any motions appearing on the record not heretofore or hereby specifically ruled upon either directly or by the necessary effect of the conclusions in this initial decision are hereby denied.

The proposed findings and conclusions submitted by counsel supporting the complaint ("CSCPF") and counsel for respondents ("Resp. PF") have been given careful consideration and to the extent not adopted by this decision, in the form proposed or in substance, are rejected as not supported by the evidence or as immaterial.

This case deals with certain matters relating to the business of selling, by mail-order, through advertisements disseminated by

[1] On August 16, 1977, the administrative law judge requested an extension of time until September 13, 1977, in which to file this initial decision. On August 30, 1977, he was notified that the Commission had granted his request.

catalogs and newspapers or magazines. Certain challenged acts and practices relate to the handling of orders and shipments and, in addition, to respondents' handling of consumers' inquiries and complaints relative to non-delivery, money-back guarantees and refunds. Other matters relate to certain advertising representations concerning the efficacy, performance and characteristics of specific products and the truth or falsity of such representations. Allegations relating to the failure to disclose material facts were also included in the complaint.

Having reviewed the entire record in this proceeding, and having considered the demeanor of the witnesses[3] [4] together with the pleadings, the proposed findings, conclusions, and arguments submitted by counsel supporting the complaint and counsel for respondents, I make the following findings of fact based on the record considered as a whole:

FINDINGS AS TO THE FACTS

About the respondents.

1. Respondents Norris, Pan-Am, Federated Nationwide Wholesalers – Garydean Corp.[3] ("Federated") and P-N Publishing Company, Inc. ("P-N") are all New York corporations with their principal offices located at 31 Hanse Ave., Freeport, Long Island, New York (Compl. Par. 1; Ans. Par. 1).

2. Respondents Joel Jacobs ("Jacobs") and Mortimer Williams ("Williams") are the sole shareholders, officers and directors of Norris, Federated and P-N (Compl. Par. 1; Ans. Par. 1; Jacobs Wr. D6A[4]). Jacobs is president of Norris (Jacobs 120). Williams is vice president and secretary-treasurer of Norris (Jacobs 122; Williams 162). Williams is president of P-N (Williams 162) and secretary-treasurer of Federated (Williams 162).

3. Respondents Jacobs, Williams and Kenneth Mann ("Mann") are the shareholders and officers and directors of Pan-Am (Compl. Par. 1; Ans. Par. 1). Williams is treasurer of Pan-Am (Williams 163). Mann is vice president of Pan-Am (Mann 213). In addition, Mann is Service Director of Future Motors, a new car franchise dealer in Long Island City, New York, selling Dodge taxicabs and other make Dodge vehicles (Mann 212).

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[3] The content of Mr. Jacob's written testimony on behalf of respondents is not the subject of significant dispute. It should be noted that respondents' counsel deferred his cross-examination of Mr. Jacobs after his testimony on behalf of complaint counsel (160).

[3] It is not clear whether "Garydean" is "Gary Dean" (See Jacobs Wr. D4A).

[4] "Wr" refers to Jacobs' written testimony. "D6A" refers to his answer to question 6 on direct examination by respondents' counsel.

4. Norris is a "gift and novelty" mail-order company selling general merchandise to the consumer (CX 405–7, 409–10). It has been engaged in this business since 1953 (Jacobs 120–1).

5. Pan-Am was in the business of selling cars to consumers by mail (Jacobs 126). It became inactive in 1975 (Jacobs 128; Mann 213). [5]

6. Federated Wholesalers Service – Garydean trading as Nationwide Wholesalers Service was incorporated as one name (Jacobs 128). It was in the business of operating consumer buying clubs, *i.e.* finding persons who were interested in buying merchandise at lower prices, and introducing consumers to mail-order companies located throughout the country (Jacobs 129; see CX 741). Nationwide ceased to operate in 1973; Federated ceased to be active in 1974; and Garydean ceased to operate in 1972 (Jacobs 128–9; Wr. D4A). On several occasions respondents used the name "Nationwide" in "price testing" advertisements in connection with the Norris business (Wr. D12A; D31A; Williams 172).

7. P-N, inactive for the last ten years, was set up to publish a sales opportunity magazine. For a short time it also engaged in the mail-order sale of higher priced general merchandise (Jacobs 127; Wr. D16A). On several occasions respondents have used the name "P.N. Publications" in connection with advertising under their master contract with TV Guide Magazine (see Jacobs Wr. D21A; D24A; see Finding 38).

8. Respondents Jacobs and Williams formulate, direct and control the policies of the respondent corporations Norris, Federated and P-N (Compl. Par. 1; Ans. Par. 1).

9. Respondents Jacobs, Williams and Mann formulate, direct and control the policies of the respondent corporation Pan-Am (Compl. Par. 1; Ans. Par. 1).

10. Respondents Jacobs and Williams, along with others not respondents herein, also have business interests in other mail-order corporations not named as respondents in this proceeding, such as Cheeselovers International, Inc. (Jacobs Wr. D34-44A; see CX 2065) and Overseas Discount Shopping Services, Ltd. (Jacobs Wr. D51-53A).

About commerce and competition.

11. In the course and conduct of its business, Norris causes to be published and mails its catalog to prospective consumers located throughout the United States. In addition, it does substantial national advertising in such magazines as TV Guide and places advertisements in newspapers with interstate circulation (CX 1963;

Jacobs 123). Also, in the course and conduct of its business, Norris mails or otherwise causes the distribution of merchandise to purchasers located throughout the United States. [6]

12. In the course and conduct of its business, Pan-Am causes to be published in the Norris catalog advertisements for its cars. Also in the course and conduct of its business, Pan-Am delivers cars to purchasers thereof located outside the State of New York (see Finding 49).

13. Respondents Norris, Pan-Am and Jacobs, Williams and Mann are engaged "in commerce" as "commerce" is defined in the Federal Trade Commission Act, and business practices relating to the matters alleged in the complaint are "in commerce" and "affect commerce" within the meaning of such terms as set forth in the Federal Trade Commission Act.

14. Respondents Norris, Pan-Am and Jacobs, Williams and Mann are in substantial competition in commerce with others engaged in mail-order businesses distributing and selling various products in commerce (see Jacobs 124).

[NOTE: The term "respondents," as it may appear hereinafter in Findings Nos. 15–48, refers to the Jay Norris Corporation, Joel Jacobs and Mortimer Williams, only (see Discussion, p. 58).]

About guarantees, deliveries, and refunds —

Advertising

15. In the Norris catalogs (see CXs 405, 406, 407, 409, 410) certain statements are made concerning guarantees, deliveries and refunds. For example, the phrase "30 DAY MONEY-BACK GUARANTEE ON ALL PURCHASES" appears prominently on the front cover (CX 409). It is also stated: "Personal Checks: to insure immediate shipment of your order, please have your check certified. Otherwise allow about 2 weeks until your check clears the bank." (CX 409, order blank). On page 33 of CX 409 the following phrase appears: "30 day money back guarantee on all items in this catalog."

Other statements include:

Your guarantee of satisfaction . . . Everything you buy from Jay Norris Corp. is always first quality. Every item is exactly as described and illustrated. Any item not up to your expectations return in 30 days for full refund (CXs 57, 409). [7]

Unless item is marked express collect, use this easy chart to figure postage, insurance, shipping and handling charges. It's only part of the delivery cost – we pay the rest.

If your order is up to:

$15.00	add $1.70
$15.01 to $20.00	add $2.20
$20.01 to $30.00	add $3.20
$30.01 to $40.00	add $4.20
$40.01 to $50.00	add $5.20
$50.01 to $60.00	add $6.00
over $60.00	add $7.20

(CX407, p. 52).

16. In the Norris newspaper and magazine advertisements similar statements are made concerning guarantees, deliveries and refunds.

Order now. Christmas Delivery Guaranteed. Mail no risk coupon now. . . . only $9.99 plus $1.00 each for shipping and handling, under your money back guarantee . . . 30-day money back guarantee (CX 2, Flame Gun, Parade Magazine, November 28, 1971). (See also CX 3261.)

30-day money-back guarantee! Mail no-risk coupon now! . . . only 7.99 plus $1.00 each for shipping and handling, under your money-back guarantee . . . prompt delivery guaranteed (CX 4, Flame Gun, Parade Magazine, November 5, 1972.)

Mail no-risk coupon today for a lifetime supply of socks . . . immediate delivery guaranteed (CX 8, Parade Magazine, January 4, 1970.)

Buy with confidence – 30-day Money-Back Guarantee (CX 17, N.Y. Times, October 24, 1971). (See also CXs 20, 24, 25, 44, 67.)

Buy with confidence – Money-Back Guaranteed (CX 28 California Living Magazine, January 7, 1973.)

Use this Jumbo TV Antenna for 30 days at our risk if not completely satisfied return for prompt refund . . . only $1.99 plus 60¢ shipping and handling under your money back guarantee (CX 886, 1–46 Jay Norris, 1975.)

[8] Order by mail with confidence – 30 day money back guarantee (CX 62, Parade Magazine, August 12, 1973 Lincoln-Kennedy Penny.)

Use these products 30 days at our risk. If not completely satisfied, return for refund. (CX 96A–D, Parade Magazine, February 9, 1975.)

90 Day Money Back Guarantee . . . you may return within 30 [90] days for prompt refund of purchase price (CX 117 A, H, Parade Magazine, March 14, 1976.)

Try this bait oil 30 days at our risk, if not completely satisfied, return for prompt refund (CX 386, New York City Metro T.V. Guide, February 15–21, 1975).

Representations

17. It is found that, through the printed statements contained in respondents' catalogs, newspaper and magazine advertisements, as well as various communications to persons who have ordered

merchandise, respondents have, as alleged in the complaint, represented directly or indirectly, that:

a. merchandise paid for by a certified check is shipped to purchasers immediately;

b. merchandise paid for by a non-certified check is shipped to purchasers about two weeks after said check has been approved for payment at the purchaser's bank;

c. the full purchase price of the product plus all additional charges paid by the purchaser in connection with said purchase are refunded by respondents if the purchaser is dissatisfied for any reason;

d. a sum of money in the form of cash, check, money order or other negotiable currency is refunded to purchasers if they are dissatisfied for any reason; [9]

e. pursuant to respondents' 30-day money back guarantee, purchasers will receive a full refund if the merchandise is returned to respondents within 30 days from the date of the purchaser's receipt of said merchandise;

f. in a substantial number of cases, the non-delivery of the purchaser's order, is caused by the loss of the merchandise by the United States Postal Service;

g. purchasers of respondents' products pay only part of the delivery cost and the respondents absorb the remaining portion of said cost;

h. exchanges or refunds are expeditiously processed by respondents; and

i. all parcels shipped to purchasers, except those items marked express collect, are insured against loss, damage or other casualty by respondents.

Consumer testimony

18. Complaint counsel presented consumer witnesses who testified about their prepaid mail-orders from respondent Norris and problems concerning delayed delivery or non-delivery of the merchandise ordered.

On January 8, 1973, Andrew Littlejohn ordered a flame gun from Norris by mail, paying for the merchandise by postal money order. A month later, having not received the ordered merchandise, Mr. Littlejohn wrote to Norris, but received no reply. Receiving no reply to subsequent letters, he contacted the Post Office Department and the Better Business Bureau. On May 3, 1973, he received the flame gun (337–339; see CX 3233).

Frank Trupia ordered a TV Antenna by mail from Norris on April

10, 1973 (332; CX 4251E). Not having received the merchandise by June 1, Mr. Trupia wrote to Norris. Receiving no response, Mr. Trupia, at the end of June, wrote to Norris again, threatening to take the matter to the Better Business Bureau. Norris responded to the second letter and in August Mr. Trupia received the ordered merchandise (332–334). [10]

In early 1973 Lester Colodny ordered a two drawer file from Norris, by mail (see CX 3091). After he wrote several letters, he received a form notice two months later and sometime after that received the merchandise (347–349).

Lois Johnson ordered a tool set from Norris by mail. She paid by certified check (3188). When she did not receive the merchandise after 4–6 weeks, she wrote to them. Norris sent her a post card response (CX 3190A, B dated August 27, 1975). When she still did not receive the merchandise she wrote again and received another post card response requesting information about the order (CX 3190C, D dated January 2, 1976). Miss Johnson did not answer the second card and never received the ordered merchandise (411–419).

Jeffrey Feldman ordered a socket wrench and tool set from Norris by mail on March 16, 1973 (CXs 3129AB, 3130). When he received his bank statement he noticed that his check had been cashed by Norris. Not having received the ordered merchandise, he wrote to Norris, but received no response. He wrote several more letters to Norris and received no reply. He then wrote to the Federal Trade Commission and, thereafter, received the ordered merchandise in the first week of June 1973 (424–429).

On March 24, 1974, Richard Waysse ordered a tube of glue from Norris by mail (CX 3320AB). On April 24, 1974, not having received the ordered merchandise, he wrote to Norris requesting the merchandise or a refund. He received a post card from Norris advising him to wait four weeks after the original order (CX 3321C). On May 24, 1974, Mr. Waysse requested Norris to send him a refund (CX 3323). He refused to accept the package from Norris when it was delivered in the latter part of June 1974 (435–439; see CX 3330). He subsequently received a refund on July 22, 1974 (CX 3334).

On November 5, 1973, Mr. White ordered a wrench and tool set from Norris by mail. After he inquired about delivery, Norris advised him that they were out of stock (453–456; see CXs 3358, 3359AB). He never received the merchandise (456, 459). [11]

On December 4, 1973, Mr. Henick ordered two sets of "Everything Organizers" from Norris by mail (483; CX 3173). He never received the merchandise although Norris was advised of the failure of delivery (see 487, 493; CXs 3173, 3178).

Clara Zappa ordered a "five-year" flashlight from Norris by mail in January 29, 1973, and when she did not receive the merchandise by May 1, 1973, she contacted the Better Business Bureau. She received the flashlight in May 1973 (529, 531–3; CX 3365, 3366).

Angela Martone ordered "Spanish Fly" fishing lure bait from American Value in February 1975, and after writing four letters to American Value* requesting shipment or a refund, she contacted the Better Business Bureau and in September 1975 received the merchandise (543–47, 549; CX 3256AB).

Allen Carreau ordered a solar blanket in April 1973. Norris requested he remit an additional 50¢, which he did (CX 3074). He did not receive the merchandise until December 1973 or January 1974 after he had contacted Norris in June, and, receiving no reply, the Better Business Bureau in October (551–556; CX 3073).

Charles Silverman ordered a tool set from Norris by mail early in November 1973. In January 1974 he wrote to Norris twice advising that he had not received the merchandise, and receiving no response to either letter, contacted the Better Business Bureau on January 8, 1974. He then received a communication from Norris and received the merchandise in May 1974.

Leslie Gordon ordered a book from Norris by mail in February 1973 (CX 3168). When he did not receive the merchandise he wrote to Norris in March, but received no reply (570–1). After he wrote to the Attorney General of New York, he received a post card from Norris in April or May advising that they were going to ship the book, but he never received either the merchandise or a refund (572, 574).

In November 1971, responding to an advertisement that guaranteed delivery by Christmas, Frank Matullo ordered a [12] flame gun by mail from Norris (CX 3060B, 3261). When he did not receive it, he wrote to Norris, but received no response. After he complained to the Better Business Bureau in March 1972, he received a card from Norris, and a few weeks later received the flame gun (576–586).

On March 29, 1974, Catherine Cunningham ordered a socket wrench tool set from American Value by mail (CX 3095–6). In two weeks she received a card from Norris advising that there would be a delay in shipment. When six months passed and she still had not received the ordered merchandise, Mrs. Cunningham, in November, wrote to Norris, but received no response. Again in January she wrote to Norris but received no answer. After contacting the Better Business Bureau, she received a letter from Norris (CX 3098). She

* For findings on "American Value," a trade name used by Norris when advertising in TV Guide, see Finding 37, *infra*.

supplied the information requested and in three or four weeks (in February or March of 1975) received the tool set (617–621).

Andrea Discepolo, in May of 1974, ordered a "moon mission" blanket from American Value by mail. Not receiving the ordered merchandise after ten months she wrote to American Value, but received no response. She wrote again a month later, but received no response. Four to six weeks after contacting the Better Business Bureau she received the product (629–637; CXs 3114, 3115).

In March 1973, Arthur Fink ordered some "miracle cement" from Norris, by mail. He wrote to Norris in May advising that he had not received the ordered merchandise, but received no response. He wrote again and received a letter from Norris asking for details about his order. Not receiving the merchandise by June, he wrote again requesting a refund. In July he contacted the New York Times, the newspaper in which the Norris advertisement appeared, and thereafter he received the merchandise (657–660).

At the end of January 1973, Henry Flury ordered two sets of tools from Norris by mail, responding to an advertisement in the New York Times (668). He received the merchandise in the beginning of April after he had cancelled his order and requested a refund (670).

On January 15, 1975, Jeffrey Simkowitz ordered "a couple of stainless steel [measuring] tapes" from Norris by mail (see CX 3305A). Three months later, not having received the ordered merchandise, he wrote to Norris. They responded by card telling him to wait four weeks from the time he sent in the order (CX 3305B). On May 30, 1975, [13] he contacted the Better Business Bureau and in June received a communication from Norris stating that if he wanted a refund he should send them the cancelled check but if he received the tapes in the meanwhile to disregard their letter. He received the tapes in the middle of June (677–683).

In 1975, John Clampet ordered an "Aztex Pendant" from American Value by mail (685–6; see CX 3080). When he did not receive the ordered merchandise and could not contact "American Consumer" by telephone, he contacted the Better Business Bureau. Thereafter Norris contacted him and advised that the product had been reshipped. Mr. Clampet never received it (688–689; CX 3084).

On April 24, 1974, John Amato ordered a pair of "Swedish scissors" from Norris by mail. After not receiving the ordered merchandise for three weeks, Mr. Amato wrote Norris and received a reply that there was a delay due to a strike. He sent two other letters and received other "excuses" (693–694, 697; CX 3041, 3042). In June, he finally received a pair of scissors (695).

On January 28, 1973, William Veale ordered a set of tools from

Norris by mail (703; CX 3318). Not receiving the ordered merchandise in four or five weeks, Mr. Veale wrote to Norris, but received no reply. He again wrote to Norris two or three weeks later, but received no answer (705). He thereafter secured a refund after contacting the Consumer Affairs Office, State of New York (705–6; see CX 3319).

In February 1975, Gloria Gebel ordered a Monaco shaver from Norris, by mail (776–7). In March, having not received the razor-shaver, she tried to contact Norris by telephone and when that proved unsuccessful she complained to the Better Business Bureau (779). The merchandise was delivered at the end of March or early April (779).

On October 1, 1975, Peter Sanchez sent his check for $21.49 to Norris, ordering a shaver-razor by mail (789–90; see CX 3288). When Mr. Sanchez had not received the ordered merchandise by October 30, 1975, he wrote to Norris on that date demanding a refund (791). He received the shaver two or three days later (792). [14]

On June 10, 1975, Bethuel Webster sent his check for $14.99, and on June 24 a check for an additional 70¢, to Norris, ordering a pair of sunglasses by mail (CX 3337). On July 30, Mr. Webster wrote to Norris advising that he had not received the ordered merchandise (1192). On August 19, 1975, having not received a response to his July 30th letter, he sent to Norris a copy of that letter. Norris responded by post card, received by Mr. Webster August 20, advising that the sunglasses should be received shortly. Having not received the ordered merchandise by September 3, 1975, Mr. Webster requested a refund or the ordered product (CX 3342). On September 10, 1975, Norris requested verification of the purchase (CX 3339). Mr. Webster responded and received the merchandise about October 10, 1975.

In November 1974, Francisco DeLima ordered from Norris by mail a refrigerator defroster and some pairs of socks (1205). Having not received the ordered merchandise Mr. DeLima contacted the Consumer Affairs Office (New York City) in January 1975 and the Consumer Affairs Office (Nassau County) six months after placing his order. Norris then communicated with him asking whether to still ship the merchandise. He responded "no" and advised them that he wanted his money back.

19. Respondents also presented a number of consumer witnesses. They testified that in response to advertisements in newspapers, and in two instances, catalogs (see Nierenberg 1792; Trial 1794), they had ordered various items of merchandise by mail from Norris and had received the ordered merchandise anywhere from a week to four

weeks, but in most instances from 10 days to two weeks (Horn 1623–5: in 1974 or 1975, "wall plaque," "plastic container for milk carton," "artificial flowers;" Burns 1632–33: in 1974 or 1975, "graffiti remover," "rust buster;" Curley 1641–2: in 1975, "hose connection;" Nelson 1647–8: in 1976, "magic window cloth;" Calderaro 1649-50: in 1969, 1972 and 1973, "weather zone," "opera glasses," "clip-on glasses;" Dulsky 1658–9: in 1972, 1974 and 1976; "framed pictures," graffiti remover," "rust buster;" Ferrari 1668: in 1973, "heating pad;" Shands 1674–76: in 1973 or 1974, "book;" Vercy 1680–2: in 1974, "hose nozzle;" Brown 1685: in 1976, "graffiti remover;" Kefer 1785–87: from 1972 to 1976, "hose nozzle," "adhesive," "wall duster;" Nierenberg 1791–3; in 1974 or 1975, "happy home recipe;" Trial 1793–4: in 1974, "wall hanging;" Lengyel 1796–7: in 1975, "carving knives;" Lowery 1797–8: in 1974, "graffiti remover;" Edwardson 1813–4: in 1975, "Make-A-Log;" Sabatino 1814–5 in 1975, "sissors;" Dyer 1816–8: in 1974 and 1976, "vegetable slicer," "car brushes"). These consumer witnesses were [15] satisfied with the delivery of their orders. To the same effect see affidavits of 21 other consumer witnesses (RX 11–31).

Consumer Agency evidence

20. Several "Consumer Agency" witnesses testified as to the nature of complaints lodged against Norris. Mr. Vincent, account executive for TV Guide, testified that over the two-month period that TV Guide analyzed customer inquiries on Norris advertising, they received 50 complaints almost all (98%) of which related to "late delivery" (837).

Evelyn Vargas, an employee of Parade Publication, a Sunday supplement distributed in newspapers throughout the United States, testified that she handled letters of complaint received by Parade (905). Her tabulation of complaints relating to Norris, compiled at the request of the Federal Trade Commission, indicated that most of the complaints related to failure to deliver merchandise (CX 2484; see also CX 2485).

Ruth Ann Marsden, an investigator with the Nassau County Office of Consumer Affairs (927) testified she handled all Norris complaints and in 1975 wrote a report concerning such complaints (938–9; CX 2495). Many of those complaints related to nondelivery or late delivery and failure of Norris to respond to letters sent to them by customers inquiring about their orders (949, 966, 988; CX 2495 C–E).

Jean Bozek, an employee of the Long Island Better Business Bureau, who handles letters of complaint in the course of her duties,

testified that she tabulated complaints relating to Norris concerning nonreceipt of merchandise and nonreceipt of refunds (999, 1014).

About respondents' handling of mail orders

21. The day the mail is received it is opened. If the order is in response to a "space advertisement," that is an advertisement placed in a magazine or newspaper instead of the Norris catalog, it is sorted by department number. The orders are also separated according to products and are sent to "key punch" that same evening (Jacobs 135–6). On the second day the order is "key punched," *i.e.*, certain information is encoded onto a computer card (136). On the third day the order goes to the computer service, Harbor Computer Systems, located in Hicksville, New York. On the [16] third or fourth day the computer service returns a shipping label to Norris. Most orders on "space advertisements" are shipped on the fourth day (Williams 181). A computer memory record is kept of the customer's name, address and the product purchased (136).

In the case of catalog orders, only the customers' name and address, the date received and the amount of money remitted are put in the computer memory (182). Catalog orders, which are handled manually, are given to the personnel in the warehouse as soon as the order is opened and the information to be sent to the computer service has been recorded on the envelope (183).

A record is made in the "cash book" of all orders as to the date received and the amount of money sent in by the customer(184–186). Although separate records are kept in the cash book for "space" sales and "catalog" sales, all monies received are deposited to the same bank account (184).

Otherwise, Norris does not keep actual records of the customers' orders (186). In most instances (perhaps 80%) shipments to the customers are made through the United States Postal Service, the rest being shipped by United Parcel Service, when it is more economical to do so (Williams 185).

Respondents are self-insured; that is, instead of paying for public insurance on shipments, they make shipments at their own risk. Because they cannot trace shipments, they make all necessary replacements at their own expense and at no charge to the customer (Jacobs 146–7; Williams 200).

About respondents' handling of customer inquiries about nondelivery

22. Respondent Jacobs testified as follows regarding Norris'

response to customer inquiries relating to nondelivery of merchandise (140-1):

> . . . The mail arrives. The girl opens it. She looks at it and she reads the customer's complaint. Assuming that there is a date on which the customer says she ordered, the girl checks the records and determines whether or not that order should have been shipped.
>
> If sufficient time has elapsed for the . . . order to have been shipped, assuming that the customer hasn't complained too quickly before she would have had a chance to receive it, the girl will send a delay notice saying that if we received your order, it should have [17] arrived by the time you receive this notice or it will be arriving soon. Please allow another few days. If you still don't have it, let us know, so we can trace it.

Mr. Jacobs added that if respondents become aware of a delay in delivery of merchandise by a manufacturer to Norris, they "notify the customer that there is going to be a delay and tell her we expect to ship within a matter of time" (142).

In this respect, in the course and conduct of their business, respondents use form notices printed on post cards by which they make various responses to customers inquiries about delivery (see Williams 195, *et seq.*) One such card reads as follows (CX 4246; see also CXs 3305B, 3321C, 3338A–D):

> Dear Customer:
>
> Your order should have arrived by this time. However, actual delivery time varies tremendously and, unfortunately, is entirely out of our control once the shipment leaves our warehouse. It is possible that it is still enroute to you.
>
> Please bear in mind that it often takes the best part of a week after mailing before an order reaches us. Then it takes a few days to process it. Since shipments are made via Parcel Post or where possible, United Parcel Service, delivery might take as long as another two weeks.
>
> We suggest you allow a total of at least four weeks from the time you mail us your order until you receive it. By now, we feel confident your shipment is either in your hands, or will be within the next few days.
>
> We are sorry for the inconvenience and appreciate your patience and understanding.
>
> Sincerely,
>
> /s/
> Rhea Nichols
> Customer Service

[18] Another form post card used by Norris in response to a complaint of nondelivery of merchandise reads as follows (CX 4245):

> Dear Customer:
>
> We received your letter that you did not receive your order. You did not give us all

the information we needed to check your order. Please supply us with the following information.

Date you mailed order _____
Merchandise ordered _____
Amount of your check _____
or money order _____

This matter will be given our immediate attention.

Thank you

/s/
Rita Andrews
Customer Relations

Another form post card used by Norris where shipment might have been delayed is CX 4243:

Re:

Dear Customer:

We are sorry there was a delay in shipping your order. It was caused by circumstances beyond our control. If you have not yet received the merchandise, please wait another week. If by that time you still have not gotten it, please indicate so below and return this card to us. We will then place a tracer with the Postal Authorities and a duplicate shipment will be made.
Thank you

/s/
Claris Walters
Customer Relations

[19] Another form post card used by Norris where nondelivery is involved is CX 4248:

This Card is Worth $1.00 to you! See Below!

Dear Customer:

We are sorry that you did not receive the merchandise you ordered. It obviously was lost in transit.

We are sending a duplicate shipment at once. You should be receiving it within the next 2 or 3 weeks or sooner.

Thank you.

/s/
Evelyn Barnes
Customer Relations

P.S. If you return this card with your next order you may deduct $1.00.

Nondelivery was sometimes due to the ordered item not being in

stock. An example of a post card used in such circumstances reads as follows (CX 3041a):

Dear Customer:

Thank you for your recent order.

Due to unusually heavy demand, the item you ordered is temporarily out of stock. More is expected soon. Just as soon as the new shipment arrives, your order will be rushed to you.

I'm sure that when it arrives, you'll be delighted with it and you will find it was well worth waiting for.

Thank you.

/s/
Rhea Nichols
Customer Service Dept.

[20] Another form post card used by Norris in 1973 reads as follows (CX 3092):

Dear Customer:

Thank you for your recent order.

Due to unusual circumstances beyond our control, there will be a short delay in shipping your recent order of our product. We appreciate your patronage and consider you a valued customer.

We will do everything possible to expedite your current order.

Please do not write. We will ship your order in two weeks or write to you again.

Respondents do not check the customers order against the information stored in the computer which they use. (see Williams 201).

About the number of customer complaints

23. Norris' annual volume of sales is approximately $13,000,000 (Jacobs 123). This involves the processing of approximately 2,000,000 orders a year. In 1976, the number of complaints received from customers was about 2% of the total orders (Jacobs 148).

In 1975, the number of complaints was approximately 2–1/2% of a total of 2,000,000 orders and in 1974 the number of complaints was approximately 3% of a total of 1,500,000 orders (Jacobs 149). Generally, Norris does not retain copies of customers' letters of complaint (Williams 189).

Unfair and deceptive practices

24. During the period of time relevant to this matter, respondents on numerous occasions have deposited customers' checks or cashed money orders, and have not shipped the ordered merchandise for many months after their receipt of the order and payment.

(Johnson 411, 418; Feldman 427; Waysse 437, 439, 442–3, 446; White 455–6; Henick 485–87, 491–2; Littlejohn 337–9; Colodny 349–50; Zappa 532; Martone 543, 545–6; Carreau 554–5; Silverman 566–7; Gordon 571; Matullo 577–9; Cunningham 620; Discepolo 633–5; Turk 658–60; Simkowitz 678–9, 682; Gebel 777–9; Sanchez 789–92; Clampet 687–9; Amato 693–5; Veale 704–5; Webster 1187, 1190–4, 1196; Delima 1205–6, 1211). [21] Respondents' representations that they ship merchandise "immediately" or in about "two weeks" are false and misleading. Moreover, receipt and retention of monies for merchandise not promptly shipped, is an unfair act or practice (see Feldman 427; Waysse 440; White 453; Henick 486; Littlejohn 338; Zappa 531; Martone 545; Silverman 567; Gordon 571; Matullo 577).

About refunds

Consumer testimony

25. Complaint counsel presented several witnesses who had requested refunds from Norris either because they were dissatisfied with the merchandise and had returned it or because they had not received the merchandise ordered.

Lester Colodny returned, by mail, the files he had ordered from Norris, requesting his money back (351; see CX 3091). Not hearing from Norris after writing "letter after letter" he wrote to the New York Times (CX 3090). Nine months after requesting the refund, Mr. Colodny received it (354). The amount of the refund was the amount he sent to Norris with his order (359).

Ralph Marino ordered and paid $19.99 plus tax, sales tax, postage and handling for a shaver from Norris in June 1975 (362, 364). Being dissatisfied, he returned it by mail to Norris (366). He received a partial refund of $19.99 in about four weeks (367, 385; CX 3249). Later he received an additional $3.10, the amount of taxes and handling charges (390–2; CX 3248A).

In July 1974 Alfred Langella ordered from Norris, and paid $7.21 for an orthopedic driver's seat for an automobile. Not being satisfied, he returned it promptly, requesting a refund (397–98). Failing to hear from Norris, he telephoned them (398–9). Getting no satisfaction from that contact, Mr. Langella contacted the Long Island Better Business Bureau, the New York Times and the Federal Trade Commission requesting help in securing his $7.21 plus shipping charges for the return of the merchandise (399; see CX 3206). Thereafter, in late October, he received a refund from Norris in the amount of $7.21 which was the amount that he had requested from Norris (401). [22]

When Jeffrey Feldman did not receive the tool set that he had ordered from Norris and paid $14.98, he wrote to Norris in May requesting delivery or a refund. Not receiving any reply from Norris he contacted the Federal Trade Commission (428). In the first week of June he received the tool set (429). Being dissatisfied with the product, Mr. Jeffrey returned it to Norris, requesting a refund (433). He again wrote to Norris in July requesting his money back (430). He finally received the amount that he had sent to Norris at the end of July or early in August (430, 434).

Richard Waysse testified that he refused to accept packages from Norris after he had demanded a refund of $2.57. Eventually, he received a refund after writing to many consumer agencies (444; see CX 3334).

John White testified that after he was notified by Norris that they did not have the tool set he had ordered in stock, he requested a refund. He never received either the merchandise or the refund (456, 458).

Bernard Henick testified that he requested a refund because the merchandise he ordered was never delivered to him, but he never received the refund (493).

Bruce Peters returned certain merchandise to Norris he had ordered in January 1974 (516; CX 3267). Not receiving the refund after three weeks, he wrote to several consumer agencies (518). In August 1976, at the suggestion of the attorney who was complaint counsel in this matter at that time, Mr. Peters wrote to respondent Joel Jacobs and promptly received a refund of the amount he had paid to Norris ($23.58) (519).

Angela Martone testified that she wrote to Norris in March 1975 about nondelivery of merchandise and requested a refund if they did not have the merchandise. She received the merchandise in September 1975, after contacting the Better Business Bureau (545–46,549).

Arthur Fink testified that he received the ordered merchandise after he had requested that Norris make a refund (659–62). [23]

Henry Flury testified that he received the merchandise he ordered from Norris after he had requested a refund, having not received the merchandise within a reasonable time (669–70). He returned the merchandise to Norris and received a partial refund ($25.00) after contacting the New York Times and the Better Business Bureau (670). Later he received the balance of the refund ($5.98) (673).

Jeffrey Simkowitz testified that he received the merchandise ordered after he had requested a refund from Norris because of nondelivery (683).

John Amato testified that he returned certain merchandise to Norris for a refund of $4.93 (693). About two months later Norris advised they would make a refund, and sent a money order for $2.00 and stamps, which amounted to 13¢ less than the total amount he had paid to Norris (696).

William Veale testified that upon nondelivery of merchandise he secured a refund of $12.00, $2.00 less than the amount he paid Norris, after contacting the Consumer Affairs Office (705–6).

Gloria Gebel returned a shaver-razor to Norris at the end of March or early April. After contacting the Nassau Consumer Affairs Office towards the end of April, in about two weeks she received the refund ($19.95) which was less than the amount she had paid Norris ($22.89) (782). She did not pursue the matter further (784).

Peter Sanchez testified that he received the ordered merchandise from Norris after he had requested a refund because of nondelivery (791–2). Being dissatisfied with the product, he returned it in early November to Norris and demanded a refund (793–4). After complaining to the Postal Authorities he received a refund check dated November 24, 1975 ($21.49) (795).

Francisco DeLima received a refund from Norris upon request after the merchandise he ordered was not delivered and after he had contacted the Nassau Consumer Affairs Office (1208).

John Dierenger returned a product to Norris with which he was dissatisfied and received what he considered to be a partial refund. After writing to the Better Business Bureau, Norris refunded the balance of 47¢ plus 1¢, in the form of postage stamps (1229), which represented the amount of postage he had paid to return the product to Norris (1233; see CX 3111). [24]

Richard Scully returned a damaged kite that he had ordered in April 1973 from Norris three or four days after receipt (506–7). He received a second kite in November after contacting the Better Business Bureau, Long Island (508; CXs 3299, 3300, 3301).

About respondents' handling of customers' requests for refunds

26. Respondent Jacobs testified that, generally, returns are opened within a matter of two or three days after the parcel arrives (at most seven days during "peak season"). The parcel is opened and duly recorded at which time the girl is actually writing the customer's refund check and an apology.

If a complaint comes in on a refund, the girl would write the customer and state that if Norris received the returned package the refund was made promptly and the customer should be receiving it soon (141–2; Wr. C2A).

The form post card used for the purpose of responding to complaints on refunds is CX 4247:

Dear Customer:

We are most anxious to clear up the inquiry about the merchandise you returned to us. If we received it, a refund or exchange was made as you requested. If you did not receive a refund or exchange, we must assume that we never got your package. We suggest you contact the postal authorities and place a tracer on this shipment.

Thank you.

/s/
Re: Mrs. B. Marks

Jacobs testified that it is respondents' policy to refund the sales tax along with the price paid for the merchandise and any instance where this was not done might be attributed to human error (Wr. D1A, D2A). He further testified that stamps have been sent as a refund "on rare occasions when the amount being sent is under $1." Credit certificates are issued only on catalog orders for multiple products when respondents are out of stock on a particular item. The customer is given the option of returning the certificate for cash or using it toward future purchases (Wr. C1A). [25]

Jacobs testified that Norris processed about 800 requests for refunds every week in 1976, and that before that, during the 1970s, the total may have been around 1000 requests for refunds per week (Wr. C3A).

Jacobs testified that respondents' policy is to handle these refund requests promptly, in a matter of days (Wr. C4A, C5A).

Respondents do not check the customers order with the information stored in the computer that they use (see Williams 202).

Unfair and deceptive practices

27. Respondents do not always refund the full purchase price of the product plus all additional charges paid by the purchaser in connection with said purchase (Marino 367, 385; Veale 705–6). In many instances respondents deduct the "handling and delivery" charge (Marino 377–8; Flury 670–5; Gebel 782–4; Veale 706; Dieringer 1229–30). Accordingly, respondents' representation that the full purchase price of the product plus all additional charges paid by the customer in connection with said purchase are refunded by respondents, if the purchaser is dissatisfied for any reason, is false and misleading.

28. Respondents do not always refund the sum of money in cash, check, money order or other negotiable currency, but issue credit

certificates or enclose stamps in connection with certain refunds (Amato 696–701; see Jacobs Wr. C1A; Resp. PF pp. 12–13). Accordingly, respondents' representation that they make refunds in cash or check or other negotiable currency is false and misleading.

29. Respondents do not always make a full refund, and sometimes have failed to make any refund, to purchasers who have returned the products within 30 days of their receipt thereof (Colodny 351–4; Marino 367, 385; Langella 397–401; Feldman 428–34; White 456–8; Henick 493; Peters 516–9; Sanchez 791–5). Accordingly, respondents' representation that they give a "30-day money back guarantee" is false and misleading. [26]

30. In several communications with customers respondents have requested that nondelivery of the customers' orders is due to the loss of the merchandise by the United States Postal Service (see CX 4248; Finding 22, *supra*). However, respondents, before making such a representation, do not ascertain whether such product has been shipped, but merely assume that it has (see Findings 21, 22, *supra*). In many instances the ordered merchandise has not been shipped. Accordingly, respondents' representation that nondelivery is due to the fault of the United States Postal Service is false and misleading.

31. There is no evidence of record to show what share of the cost of delivery is paid by respondents or their customers. Thus it cannot be determined whether respondents' representation that they absorb a portion of the delivery charges is true or false.

32. In some instances refunds are not expeditiously processed by respondents. Many purchasers have encountered long delays, sometimes constituting many months before receiving their refunds. Many purchasers' refunds have been secured only after they sought assistance from consumer protection agencies or local, state, and federal government agencies (Waysse 444; Peters 516–9; White 456, 458; Henick 492; Colodny 351, 354; Marino 377–8; Scully 507; Fink 659; Flury 669–70; Langella 398–400; Sanchez 791; Amato 696; Veale 706; DeLima 1207; Dieringer 1229).

33. Respondents are self-insured. Their representation that the purchasers merchandise will be shipped insured is false and misleading.

About respondents not answering customers' inquiries and complaints

34. Respondents, on numerous occasions, have failed to answer customers who have written to them complaining of nondelivery of merchandise ordered and paid for (Trupia 333; Littlejohn 337; Jeffrey 427–8; White 463; Henick 487, 492; Martone 545–6; Carreau

554; Silverman 566; Matullo 579; Discepolo 634; Clampet 687–8; Veale 705; DeLima 1206). In other instances respondents' replies have not responded to the customers' complaint, but have tended to delay and prevent customers from seeking delivery of merchandise or refund of money (Johnson 412–6; Waysse 437–43; White 455–6; Henick 487, 492; Colodny 351; Martone 545–6; Carreau 554; Silverman 566; Gordon 571–2; Matullo 579; Cunningham 620; Discepolo 634–6; Fink 659; Flury 671; Simkowitz 679, 683; Langella 398–9; Sanchez 795; Clampet 689; Amato 694; Veale 705; Webster 1193–5; DeLima 1206–7, 1211). [27]

About respondents not listing their telephone number

35. Respondents do not have the Norris telephone number listed in the Nassau County telephone directory, and many customers who have attempted to contact Norris by telephone have been unable to do so (Trupia 332; Feldman 427; White 456, 459; Scully 506; Peters 515, 525–6; Zappa 531; Carreau 559, 563; Silverman 568; Matullo 579; Discepolo 634; Clampet 687–8; Amato 695, 699; Gebel 778, 785; Sanchez 790; Dierenger 1228). Some customers were able to reach Norris by telephone (Langella 400; Henick 501; Gebel 782).

About respondents requiring customers to make proof of purchase

36. In certain instances, in response to complaints by purchasers about nondelivery of merchandise or failure of respondents to make refunds, respondents have required the purchaser to submit details concerning the transaction (see Williams 189). In cases of nondelivery, respondents request the cancelled checks, order blanks and a full description of the merchandise ordered (see CX 4245; Finding 22, *supra*). In cases involving demands for refunds, respondents require the purchaser to submit proof of purchase and proof of the return shipment to Norris, namely the insurance receipt (see Williams 201; see CX 4247).

About respondents' advertising in TV Guide

37. The J. Morton Williams Advertising, Inc., ("Morton") is the "in-house" advertising agency of Norris (Jacobs Wr. D22A). Its officers are Jacobs and Williams (Malfitano 234).

Before 1975, Norris advertised in TV Guide under the name "American Value." Actually Norris placed this advertising through "American Consumer," a competing mail-order business (Jacobs 124; Malfitano 243, 269; CXs 386, 389, 1808D), in order to take advantage of lower advertising rates that "American Consumer" could offer as

part of its master advertising contract with TV Guide (Jacobs Wr. D13A, D14A).

In 1975, Norris entered into its own master contract with TV Guide. Morton placed not only Norris advertisements to be published in TV Guide, but also handled insertion orders for other sellers (Malfitano 238, 267). In this [28] respect, it notified TV Guide, as it was required to do, of the various names under which advertising would be placed under the contract (Jacobs 134, 138; Wr. D23A; Williams 167, 170; Malfitano 261). These names included Value House (CX 645, 646, 649); Fashion Scene (CX 667); Unique Ideas (CX 669); Deter Stop Smoking Plan (CX 694, 867); House of Values (CX 699, 868, 2754); and Fashion Scene & Value Corner (CX 706, 868). (See also Jacobs Wr. D24A, D25A). Morton bills these other advertisers (Malfitano 248). The merchandise ordered under these names by purchasers were shipped by the other sellers, not Norris, the address on the coupons not being that of Norris (Malfitano 247; see CXs 2783–90, 2792–3, 2795–2801, 2804–5). Norris never used these names in advertising its own products (Jacobs Wr. D26A, D27A).

On July 30, 1975, Roslyn Malfitano, an employee of Norris who described her duties as Advertising Director (233) wrote the following message to TV Guide from Morton (CX 866):

> This is to advise you that the following companies all divisions of the Jay Norris Corp., are entitled to be covered under the Jay Norris Master contract:
>
> P.N. PUBLISHING, J. MORTON WILLIAMS ADVERTISING INC., FEDERATED WHOLESALERS, VALUE HOUSE, UNIQUE IDEAS, AGGRESSI VESTOR, FASHION SCENE, CHEESELOVER'S INTERNATIONAL.

Subsequently, on February 17, 1976, she wrote the following message to TV Guide (CX 869):

> Please be advised that Jay Norris Corp. has a major interest in the Adventurers & Radio Club.

Apparently Miss Malfitano's description of the relationship between Norris and the named organizations was to qualify them as advertisers, and was not intended to reflect a legal relationship (Malfitano 244, 263; Jacobs D28A, D29A, D32A).

About respondents' other advertising

38. Occasionally, Norris will advertise under another name. "Nationwide Wholesalers Service" was used to test a price (Williams 172). However, "P.N. Publication" was used in connection with another seller's advertising via the Norris-TV Guide contract (Jacobs Wr. D21A). [29]

J. Norris advertisements were run by out-of-state publishers, contracted by an agency to supply such advertising to publications of limited circulation. Sometimes, a local address would be used and the publisher or the agency would send the orders in bulk to Norris for filling (Jacobs 139). This did not constitute over 2% of Norris' business (Williams 176).

About Cheeselovers International

39. Cheeselovers International is a separate corporation. For a short time it had offices in the Norris Building, but has since "moved" to Westbury, Long Island, where it maintains a separate mailing address (Wr. D41A). During the time it was located in the Norris Building, Cheeselovers International had its own employees and paid all of its own bills (Wr. D42A, C14A, C15A, C16A; see CX 2065).

About respondents' mailing addresses

40. Respondents do not use post office box numbers; in fact now they have their own zip code, and the United States Postal Service provides a portable trailer substation for the handling of Norris mail (Williams 174–75).

Some of the mailing addresses used by Norris on the coupons which appeared in the various advertisements for Norris' products follow: American Value, Norris Bldg. 25 W. Merrick Rd., Freeport, N.Y. 11521 [February 1975] (CX 386); Jay Norris Corp., 31 Hanse Ave., Freeport, N.Y. 11520 [November 1971] (CX 2); [November 1972] (CX 4); [January 1970] (CX 8); Jay Norris Corp., 85 Henry St., Freeport, N.Y. [October 1971] (CX 17); Jay Norris Corp., 25 W. Merrick Rd., Freeport, N.Y. 11520 [1972] (CX 24); [1974] (CX 25); American Value, 25 W. Merrick Rd., Freeport, N.Y. 11520 [June 1973] (CX 26); Jay Norris Corp., 25 W. Merrick Rd., Freeport, N.Y. 11521 [1975] (CX 886).

In 1973, Norris' business mailing address was 31 Hanse Ave., Freeport, N.Y. 11520 (see CX 3301) and in 1976 it was 31 Hanse Ave., Freeport, N.Y. 11521 (see CX 3190C).

About respondents' various business styles

41. In the complaint it is alleged that respondents used numerous corporate names and various post office box numbers and addresses in such a manner as to create confusion in the minds of purchasers who are unable to relate all the names used to Norris or to its principal owners (Par. 13(e)). [30]

Appendix B

The names listed in the complaint are Jay Norris Corporation, P.N. Publishing Corporation, Norris Nutrition, Garydean Corp., Federated Nationwide Wholesalers Service, Federated Wholesalers Service, Nationwide Service, Cheeselovers International, Pan American Car Distributors Corporation, Associated Auto Wholesalers Corporation.

This charge is not sustained by the record in this case. It does not appear that respondents tried any subterfuge in the use thereof. The only confusion of record arose from the use of "American Value" by Norris during the time when Norris was advertising under the American Consumer master contract with TV Guide. Several consumers testified that they did not know they were dealing with Norris (White 456–9; Martone 544; Cunningham 617, 622–5; Discepolo 629, 635, 639; Clampet 684–91). In my opinion this does not amount to an unfair or deceptive practice within the meaning of the Federal Trade Commission Act. Moreover, there is nothing unlawful about a company offering reduced advertising rates through its master contract. In any event, the complaint does not charge that respondents have hidden the identity of other sellers by use of respondents' various trade names.

About respondents' representations as to the performance, efficacy or characteristics of their products

42. In their catalogs and in their newspaper and magazine advertisements, respondents have made statements and representations about the performance, efficacy and other characteristics of respondents' products. Seven products were specifically named in the complaint and allegations relating to false and deceptive representations were set forth in said complaint. During the discovery phase of this matter, complaint counsel attempted to use pretrial procedures to look into the efficacy of additional products. Respondents' objection to expanding this case in this manner was sustained and the issues on product performance, efficacy and other characteristics were limited to the seven products and the matters raised in the complaint.

JN INSTA-JET PROPANE FLAME GUN

43. In advertising their flame gun, respondents make the following representations (see CX 4 [1972]; CX 2 [1971]).

Fastest Way We Know To Clear Away Ice and Snow THE WORK-SAVER, THE HEART SAVER Lightweight, Easy-Handling New JN INSTA-JET PROPANE FLAME GUN [31]

Appendix B

This new JN Insta-Jet Propane Flame Gun takes the work right out of dozens of clean-up chores. In winter, the adjustable instant-action flame clears away ice and snow faster than you'd believe possible. Whips through even the heaviest drifts. Clears walks and driveways . . .

Produces a clean, hot flame for up to 14 hours on a single propane cylinder — easily obtainable at hardware, paint and department stores. . . .

The advertisements include a picture of a woman using the flame gun to clear a front walk from what appears to be a significant snow accumulation (see CXs 2,4).

In the complaint, it is alleged that respondents have represented that "The 'J-N INSTA-JET PROPANE FLAME GUN' is able to whip through the heaviest snow drifts and the thickest ice in seconds and is effective and efficient in clearing walks and driveways of ice and snow."

It is found that respondents have, in fact, directly or indirectly, made the representation as alleged in the complaint.

John Lomash, Sales Manager for the Engineering Division of the United States Testing Company (not affiliated with the United States Government) testified that when he was a Project Engineer he performed certain tests on a flame gun supplied by Gem Products Corporation (1238–9). At the time the test results were disclosed to the Federal Trade Commission, the consent of General Fabricators, parent company of Gem Products Corporation, was sought (1240). General Fabricators supplied flame guns to Norris in 1971–1972 (Stip. 38).[4]

On the basis of the tests, Mr. Lomash was of the opinion that the flame gun was not very effective in the removal of ice. The test revealed that it took 6.5 minutes to melt 1/8 inch of ice 1 square foot at zero degrees Fahrenheit, and 11 minutes to melt a 1/4 inch thick patch of ice one [32] square foot at zero degrees Fahrenheit (1251). In addition, they tested the maximum duration of the flame and found it would burn continuously at minimum length for 32 1/2 hours (CX 2481A, B).

Andrew Littlejohn testified that the flame gun he purchased from Norris in early 1973 was not effective in removing snow about 18 inches deep. He used it for about 45 minutes and "finally I got a hole down there where I could put my arms in" (342, 344). "It is no good for burning snow" (344).

Elliot Burger testified that when he received the flame gun from Norris, he purchased a propane cylinder and he assembled it. He tried to melt ice for ten minutes without success (603–4). He testified

[4] "Stip." refers to stipulation of counsel on the record during document day, the first day of adjudicative hearing in this matter. The numerical reference is to the page of the transcript on which the stipulation appears.

that the flame was not coming out of the end of the nozzle but out of the sides of the nozzle (614).

Frank Savoca purchased a flame gun from Norris in December 1971 (1492–3). He "received a long length of metal tubing, hollow tubing with a nozzle attachment at the bottom, with written instructions to obtain a propane tank at any hardware store" (1493). He further testified that the "ad gave the impression that the item was complete and ready for use" (*ibid.*).

He tried to melt off an "icy patch in front of the house" trying the gun on about "a square foot" patch for fifteen minutes. The result was "absolutely negative" (1494).

Respondents' representations as to the performance characteristics of their flame gun are total exaggerations. The flame gun will not "whip through even the heaviest drifts" of snow and is not "the fastest way . . . to clear away ice and snow." Moreover, it is not effective and efficient in "clearing walks and driveways of ice and snow." Respondents' representations are false and misleading.

The complaint further alleges that respondents have failed to disclose in their advertisements that the customer must purchase a propane gas cylinder and assemble the flame gun before it can be used. It is alleged that such facts are material to the consumers' choice of whether to purchase the product and that failure to disclose such facts constitutes a violation of the Federal Trade Commission Act. [33]

It is found that failure to reveal that the propane cylinder is not included, considered with the other representations in the advertisement (especially the picture of the person using a flame gun with a cylinder attached), is withholding a material fact.

The record is not clear whether the parts shipped do in fact come unassembled. Anyway, while it would be *nice* for everyone to know this fact, failure to disclose it is not, in the circumstances of the flame gun advertisement, a nondisclosure that would constitute an unfair or deceptive act or practice in violation of the Federal Trade Commission Act.

SURE-KILL ROACH POWDER

44. Respondents' advertisements on roach powder read, in pertinent part, (see CXs 17, 20, 23, 24, 25, 26; see also CX 117):

Get Rid Of Roaches ONCE AND FOR ALL SURE-KILL WIPES OUT ROACH NESTS OR YOU PAY NOTHING

Roaches can't resist Sure-Kill. They devour its odorless white powder and crawl to their nests, where they die. Then, a deadly chain reaction starts, that wipes out every

roach and every egg in the nest. Sure-Kill is safe to use, and never loses its killing power – even after years. A single can cleans out 6 to 8 rooms.

GUARANTEED ROACH-FREE FOR 5 YEARS Sure-Kill roach killer is guaranteed by the manufacturer to prevent reinfestation for up to 5 years when used as directed and left in place.

In the complaint it is alleged that through their advertisements on roach powder, respondents represent (Par. 10. (4–8)):

Respondents' roach powder is safe to use.

Respondents' roach powder gets rid of roaches once and for all. [34]

Respondents' roach powder creates a deadly chain reaction which eliminates and kills roaches and eggs.

The manufacturer has unconditionally guaranteed that respondents' roach powder prevents reinfestation when used as directed and left in place or it will refund money.

Respondents' roach powder does not lose its capacity to kill under any conditions of use.

It is clear from merely reading the advertisements that respondents have made the representations alleged in the complaint.

Dr. Charles Mampe, Entomologist (relating to the "study of insects"), an employee of Western Industries, an "exterminating company," testified that he was employed for 10 years between 1964 and 1974 by the National Pest Control Association (1347–8).

He testified that boric acid is toxic to warm blooded animals, and used as a roach powder for the control of roaches in the home, it would represent a hazard (1351–2), if not used as directed (1390). He further testified that it was less effective than other products used, because it works much more slowly, approximately four days (1355, 1400). He added that he was not aware that any "chain reaction" occurs when boric acid is used as a roach control because the roach, to be killed, must contact and ingest the boric acid directly (1356). Although boric acid never loses its "killing power," for practical purposes, it loses its effectiveness if covered by dust or grease or becomes damp (1357). Boric acid will not be effective for five years under practical conditions (1359).

Dr. Mampe testified that, in his opinion, use of boric acid as a roach powder would not prevent "reinfestation," in the eyes of the homeowner (1365); that is because the presence of roaches moving from other places would appear in the places treated (1397, see 1407),

and that the same is true for all roach controls (1410). He added that he was not aware of any information "that indicates that boric acid will kill roach eggs or in any way affect the eggs" 1366, 1380–1).

Boric acid has been used as a roach control since 1900 and it is effective in killing roaches (1352, 1391). It is not repellant to roaches (1401). [35]

Thomas Williams, inventor and manufacturer of Sure-Kill Roach Killer, testified that his product has been sold to Norris (1412, 1419). He testified that although he gives a money-back guarantee that the product will get rid of roaches, he does not use the words "wipe out" or "forever riddance" because roaches move around (1416–17; see 1423). He added that generally the product is effective for approximately six months (1423). He also testified that the "chain reaction" does not always happen and it is not the primary way of killing roaches (1424). He did not think that one application would be effective for 5 years (1425).

Mr. Williams testified that Sure-Kill was 50% boric acid, 50% inert materials (1435), was a good product[7] and that his money-back guarantee is unlimited as to time (1437). He also testified that, in his opinion, Sure-Kill was a safe product (1445).

Meyer Biddleman, President of Hye Test 303 Corporation, a manufacturer of chemical specialty products (1449), testified that his corporation compounds a roach powder for Valley Research Systems under the name High Action (1450). He drop-shipped this product directly to Norris between 1971 and 1975 (1450–1). This product is made of 50% boric acid and 50% inert ingredients (1451). He added that his customers like the product, "it does a terrific job" (1457, 1460). He guaranteed that the product would be effective and perhaps notified respondents that this guarantee was for a 5-year period (1463).

Edwin Meyer, President of Heddy Corporation, a manufacturer of chemical specialities, has sold a roach powder to Norris from 1973 (1475, 1479; see CX 2507). He never supplied Norris with any information about the efficacy of the product and has never discussed Norris' advertising with Norris (1484–5).

Emily Urf, the only consumer witness who testified about Norris' roach powder product, said that she ordered a can of that product in 1972, and that, after using it for [36] two months, she still had roaches (641–7, 654–5). She added that if she had known that the product was 50% boric acid and 50% inert ingredients she would not have bought it at the price she did pay (647–8, 653).

[7] "It sure will kill the roaches if you put it in your home according to directions" (1441).

It is found that respondents' roach powder is relatively safe to use, if it is applied according to instructions (CX 2493C). The question is whether respondents' advertisements represent that the product is absolutely safe, *i.e.*, non-hazardous, and whether, as further alleged in the complaint, respondents' failure to disclose (1) that the product is hazardous, (2) that it may be harmful to human beings and pets, and (3) that special precautions should be taken in its use, constitutes misrepresentation in that such is a failure to disclose material facts to the potential consumer (see CX 4060, 4186).

In my opinion any overt representation that a potentially hazardous product is "safe" must be accompanied by a true statement as to the conditions under which it can be used "safely" (see CX 3020). Accordingly, respondents' unqualified representation that the product is "safe," is misleading, deceptive and unfair.

Respondents' roach powder is a formulation of boric acid which works slowly (CX 2493C). If used properly it will control and prevent reinfestation in treated areas. In many residential buildings cockroaches can move into the treated areas before those located there are completely eliminated. Accordingly, respondents' product may not get rid of roaches "once and for all," and respondents' unqualified representation that it does, is misleading and deceptive.

Respondents' roach powder will not kill roach eggs. Moreover, it does not create a deadly chain reaction which eliminates and kills roaches and eggs. Each cockroach must contact the boric acid to be killed. Accordingly, respondents' representations that the product creates a chain reaction and kills roach eggs are false and misleading.

Respondents' roach powder loses its capacity to kill roaches under certain conditions of use. If wet, it cakes and does not adhere to the roaches although upon drying it becomes an effective control once more (see CX 2493F). [37] If covered by grease or food deposits or dust, it becomes ineffective. Accordingly, respondents' representations that the roach powder does not lose its capacity to kill is false and misleading.

The record shows that the suppliers-manufacturers of the roach powder sold by Norris from 1970 to 1975 did unconditionally guarantee the product. There is no evidence that they did not honor this guarantee. The question is whether respondents' statement of the guarantee is, in effect, a representation that the product gets rid of roaches once and for all and does not lose its capacity to kill under any conditions. In my opinion, respondents' statement has the capacity to make such a false representation.

The complaint also alleges that failure to state the chemical

ingredients (*i.e.*, 50% boric acid; 50% inert ingredients) is a failure to disclose a material fact. Boric acid is a well-known ingredient for roach killers. The consumer, who is ordering by mail, does not know what the ingredients are until receipt of the product. She is not in a position to make an informed judgment as to the nature of her purchase. Accordingly, facts as to the ingredients are material facts and failure to disclose them is failure to disclose material facts.

FOREVER SOCKS

45. Respondents' advertisements on socks read, in pertinent part, as follows (see CX 8, see CX 14):

YOU'LL NEVER NEED TO BUY ANOTHER PAIR OF SOCKS AGAIN – FOR THE REST OF YOUR LIFE! (unless your laundry loses them).

These revolutionary 8-ply socks are so indestructable . . . you can order Free replacements – pair for pair – for any you ever wear out . . . anytime!

. . . Guaranteed to wear forever, in normal use. That "normal use" simply means don't burn holes in them deliberately, or try to cut them with scissors or razor.

. . ."forever socks" . . .

. . . "lifetime supply of socks"

The complaint alleges that by the above statements in advertisements respondents represented that their "Nylon socks" are "indestructable" and they "last forever" (Par. 10 (2, 3)). [38]

It is clear from merely reading the advertisements that respondents did *not* make the representations alleged in the complaint. What is represented is that these socks are *practically* indestructible and, if they wear out, the customer may order a free replacement from Norris. Accordingly, the advertisements present a "forever" guarantee, not an indestructible sock.

Robert Sharp, President of Sox Unlimited, selling agents for various Southern mills, testified that his company has been one of the suppliers of "hosiery to Norris for approximately ten years, off and on" (1504, 1515). He considered that the product "for wearability was a high quality sock, it is a heavy nylon sock" (1508). Neither the Southern mills (manufacturers) nor Sox Unlimited, guarantees the product (1511).

Mr. Sharp was of the opinion that the socks would not wear forever, and did not think "anything" was indestructible. However, he added that "they are good socks and they will last an awful long time" (1515), unless they are worn by a person with an oversized foot (1517, 1519–20).

Salvatore Marsala, the only consumer witness to testify about respondents' socks, said that he was attracted by respondents' statement in advertising that "you'll never need to buy another pair of socks again." He ordered a dozen pair, wore one pair a short time (one hour (595) or twelve hours (599)), and it developed a hole in the toe (595). They were returned to Norris (595).

Mr. Marsala testified that he had a shoesize of thirteen. As explained by Mr. Sharp, a shoe size of thirteen was actually an oversized foot for a thirteen sock size (see Sharp 1516–7; 1521–2).

Certain indirect representations not challenged by the complaint are that the manufacturers unconditionally guarantee the socks (see CXs 8, 14). In truth and fact, the manufacturers do not guarantee the socks. In any event, this area is outside the scope of the complaint and, in my opinion, it would be unfair to amend the complaint at this time to encompass these representations. The administrative law judge sustained respondents' objection to any further testimony relating to Mr. Marsala's return of the socks and any subsequent replacement or refund, as not being relevant to the matters for which the witness had been noticed to testify (595–7). There is no evidence that respondents do not live up to their own guarantee on the socks. [39]

FIVE YEAR FLASHLIGHT

46. Respondents' advertising on the "Five Year Flashlight" in pertinent part reads (CXs 44, 46; see CX 45, 2132):

THE FIVE YEAR FLASHLIGHT

Guaranteed Storage Capacity for 5 years or Your Money Back. 10 Times the Staying Power of an Ordinary Flashlight

• • • • • • •

. . . The completely new, Command Module 5 Yr. Flashlight

• • • • • • •

From the company that made flashlights for every manned Moon mission . . . Command Module Lighting . . . the flashlight with proved storage capacity for its power cell for AT LEAST FIVE YEARS combined with 10 TIMES THE STAYING POWER of any ordinary flashlight. Yours in a handsome Command Module case with no external switch to corrode or break . . .

• • • • • • •

ABSOLUTE 5-YEAR GUARANTEE

Every Command Module Flashlight carried this Absolute 5-year Guarantee. Carry

Appendix B

your flashlight with you, keep it at home. It must work even if you haven't touched it for 5 years or your money back. So don't be another minute without the one safety element every car, every family needs.

It is alleged that through their advertising respondents represented that their "five year flashlight" carries an absolute 5-year guarantee (Par. 10 (13)). From a reading of the text of the advertisement, including the "guarantee" as described in the advertisement, it is clear that Norris did make the representation alleged in the complaint.

Chromalloy Electronics supplies the battery to Norris (RX 7, 8). Its guarantee to the consumer reads as follows (CX 2044B; Stip. 811–12):

Your 5 Year light is guaranteed against defects in materials and workmanship for a period of 30 days. [40]

If, during the 30 day period, your light fails to operate . . . return it to the dealer for an immediate exchange.

Your light is also guaranteed to remain usable for a period of five years providing it has not been used more than 10 hours. Specifically, the light is guaranteed to store and remain useable for 5 years or operate for a total of 10 hours, which ever comes first.

In the event that the light does not work and has been used for less than 10 hours and is less than 5 years old, return the light (prepaid) with proof of purchase and date of purchase to the address below for battery analysis and replacement.

Proof of date of purchase is considered to be the burden of the consumer and each proof must be supplied when applying for guarantee replacement.

Guarantee valid only during normal care and use at ambient temperatures. Abuse of the light or tampering with the case voids the guarantee.

The foregoing is in lieu of all other guarantees, expressed, implied or statutory and Chromalloy Electronics neither assumes or authorizes any person to assume for it any other obligation or liability in connection with the sale of this product.

Counsel also stipulated, and David Rush, President of ACR Electronics, Inc. (formerly Chromalloy) (811), agreed that if he testified he would state that "the average amount of time that the ordinary person would normally use or generally use a flashlight, any flashlight, would not generally exceed two hours per year" (Stip. 813).

In the instructions to the consumer, Chromalloy advises in pertinent part (CX 2044A):

This unique light was designed primarily for emergency use. It is the only light that can be left in your kitchen drawer or car glove compartment for a period of 5 years and still operate.

Appendix B

Of course the light will not stay "on" continuously for 5 years but with normal emergency type use, it will retain its power for the full 5 year period. The total "on" time of 10 to 20 hours means a minimum of 4 half hour emergency uses each year for 5 years. [41]

Simply stated, the light will not self destruct like all other lights.

Clara Zappa, the only consumer witness who testified about the Norris flashlight stated that after three months, during which she checked to make sure it was in working order, "it was not a flashlight any longer . . . [i]t seemed to be dead" (533).

Norris' "Five Year Flashlight" is guaranteed by the manufacturer to store and remain usable for 5 years or to operate for a total of 10 hours, whichever comes first. The manufacturer further clearly states in its guarantee that the light will not stay "on" continuously for 5 years. Respondents' representation that the flashlight carried an absolute 5 year guarantee is false and misleading.

It is further alleged in the complaint that the facts that (1) the flashlight has an "on" life of 10 to 20 hours, and (2) the manufacturer guaranteed that the light can be stored and remain usable for 5 years or operate for a total of 10 hours, whichever comes first, are material facts and that respondents' failure to disclose those facts was a violation of the Federal Trade Commission Act (Par. 12).

Considering the content of respondents' advertisements, it is found that the facts alleged to be material are important to the consumers' decision as to whether to purchase the product, and that respondents' failure to disclose that information is unfair and has the tendency and capacity to mislead the purchasing public.

LINCOLN-KENNEDY PENNY

47. In their advertisements for the "Lincoln-Kennedy Penny" respondents state in pertinent part (CX 69, see CXs 62, 66, 275):

Now Available WORLD'S FIRST LINCOLN-KENNEDY PENNY –

UNCIRCULATED COMMEMORATIVE LINCOLN HEAD PENNY WITH KENNEDY PROFILE

• • • • • • •

Here's unusual news for collectors and anyone interested in unique commemorative issues . . . issues that may never be repeated again. A new, uncirculated Lincoln Head penny is now available. [42]

This unique coin shows the profile of President Kennedy stamped on the surface, looking at President Lincoln. The relationship is uncanny. Never released through ordinary channels, the coin is perfectly legal tender, acceptable under section 33[1], Title 18 of the U.S. Code. As a coin of both historical and numismatic significance, it

might well become a sought-after collector's item that could grow and grow in value. Because, however, this coin is not in circulation, you may obtain it only through an offering of this sort, and we urge you to order now, avoid disappointment. And if you order right away, you will also receive The Plaque of Coincidences, showing the startling parallels in the careers of these two tragic figures . . .

FREE WITH EACH COIN ORDER HISTORICAL RESUME OF ASTONISHING COINCIDENCES BETWEEN LINCOLN & KENNEDY

• • • • • • •

These and many more astonishing coincidences are yours in your Free Plaque of Coincidental Facts when you order the Lincoln Kennedy Commemorative Penny.

The complaint alleges that through such advertisements respondents represent that (Par. 10 (24, 25, 26, 27)):

1. Respondents' Lincoln-Kennedy penny was minted by the United States Treasury Department;

2. Respondents' Lincoln-Kennedy penny is a coin of historical and numismatic significance which is certain to grow in value;

3. The issuance of respondents' Lincoln-Kennedy penny was sanctioned by Section [331], Title 18 U.S. Code; and

4. A free plaque containing historical coincidences between the lives of President Lincoln and President Kennedy is provided to purchasers with each coin.

From a reading of the advertisement as a whole, and with special attention to the statements quoted above, it is clear that respondents made the representations as alleged in the complaint. [43]

Norman Stack, a rare coin dealer with 30-years experience, testified that a "Lincoln-Kennedy Penny does not exist as struck by the United States Government," and that its existence is not unusual news for collectors (1322). He was of the opinion that altering an already minted coin does not increase its numismatic value, which is determined because of a shortage of the coin, by attrition or by the quantity struck (1326, 1331, 1341–2, 1344). He added that the Lincoln-Kennedy Penny, because it was not struck by the United States Mint was of no historical significance, was not of numismatic significance, was not a "commemorative coin" and was never "minted" (1332).

Henry Weissblatt, former President of Federal Coin and Currency, a gold coin wholesaler, and a coin dealer on his own, testified that the so-called Lincoln-Kennedy penny shown to him was not "unique," was not minted by the United States, was not unusual news for collectors, was not of numismatic significance, and was not a commemorative coin (1468–9). He added that, in his opinion, the coin would not be of value to coin dealers (1470).

On August 1, 1973, the United States Postal Service, by its General Counsel, initiated a proceeding wherein it was charged that respondents, in advertising its "Lincoln-Kennedy Penny," had made false representations (CX 3029):

1. That the United States Treasury Department has minted a commemorative Lincoln Head penny with a Kennedy profile;

2. That the Lincoln-Kennedy penny, though legal tender, is uncirculated and never released for ordinary use;

3. That the issuance of the Lincoln-Kennedy penny is sanctioned by Section 331, Title 18, U.S. Code; and

4. That because said coin is of historical and numismatic significance, it is certain to become a collectors' item that will grow and grow in value. [44]

Chief Administrative Law Judge Duvall, in his initial decision filed October 19, 1973, found that respondents had made the representations alleged in the Postal Service complaint. He also found that representations 1, 3, and 4 were false, but found that the second representation, although technically false, was not "a material misrepresentation" (CX 3030).

The Postal Service, in its opinion filed February 27, 1974, sustained the administrative law judge's findings as to 1 and 4, and indicated that it believed determination as to the material nature of representation 3 was covered under its findings as to representation 1 (CX 3032). The Postal Service determined that respondent Norris was engaged in a scheme or device for obtaining money or property through the mail by means of materially false representations, and issued, on February 27, 1974, through its Judicial Officer, an order relating to the limited postal services thereafter available to Norris. Subsequently, the parties stipulated as to the handling of Norris' mail which was approved on March 12, 1974, by the Judicial Officer (CX 3034).

The particular representations challenged in the Federal Trade Commission proceeding appear to be similar to those considered by the Postal Service and those advertisements were disseminated before the issuance of the Postal Services' Order.[8]

It is clear that the Lincoln-Kennedy penny was not "minted" by the United States Government and that issuance of the Lincoln-Kennedy penny was not sanctioned by Section 331, Title 18, U.S. Code. Only the Lincoln penny, on which the Kennedy profile is superimposed, was minted and sanctioned, and respondents' representations are false and misleading.

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[8] Advertisements disseminated after the Postal Service order are CX 275 (February 9, 1974) and CX 405 (at page 11, 1975 Catalog).

Appendix B

The Lincoln-Kennedy penny is of no historical and numismatic significance and there is no indication that it is certain to grow in value. Respondents' representations in this respect are false and misleading.

Finally, respondents offer of a FREE plaque (see CX 3027) is actually not an offer of a "free" item. The plaque is part of the [45] regular offer at the price of the coins and plaque, and accordingly the use of the word "Free" is unfair and deceptive.

TV ANTENNA

48. In advertisements for their "JUMBO TV ANTENNA," respondents make the following statements (CXs 28, 886 (p. 46)):

Every home a super receiver ELECTRONIC MIRACLE TURN YOUR HOUSE WIRING INTO A JUMBO TV ANTENNA

Do you know that you have one of the greatest TV antennas ever constructed? It's better than any set of rabbit ears, more efficient than complicated external antennas. It's your house. Yes, the wiring in your home constitutes a giant antenna that acts as a super receiver for TV, FM, all kinds of difficult reception.

And the secret to using all this reception potential is an amazing little plug-in attachment that utilized the receptivity of your house wiring without using a single bit of electrical power. Yes, you simply attach the adapter easily & quickly to your set . . . plug it in to any wall outlet and immediately your entire electrical system is working for you. No ugly looking rabbit ears, no difficult, dangerous to maintain external antennas, and reception so sharp and clear it will amaze you even in the more difficult areas.

In the complaint it is alleged that through their advertisements respondents represented that (1) the TV antenna will bring sharp and clear reception even in difficult areas; (2) the performance of respondents' TV antenna is superior to any rabbit ear antenna or outdoor antenna; (3) respondents' TV antenna will turn all types of house wiring into a TV antenna; and (4) respondents' TV antenna is an electronic miracle (Par. 10 (9, 10, 11, 12)). [46]

From merely reading the advertisements, especially the portions quoted above, it is clear that respondents made the representations set forth in the complaint.

Frank Triolo, an electronics engineer employed by the United States Electronic Command in Fort Monmouth, New Jersey, testified that he conducted tests on the Norris TV antenna ("C-M Antenna") in December 1973, at the request of the Federal Trade Commission (272-3). From a comparison of the actual pictures received on television sets as well as an electronic measurement of the "received voltage" at the television sets, Mr. Triolo concluded that the Norris

Appendix B

antenna was "definitely inferior to all the other antennas that we used for comparison" (275; CX 2704).*

Mr. Triolo was of the opinion that the performance of respondents' TV antenna was not superior to any rabbit ear antenna or outdoor antenna and that it was not an electronic miracle (327-8). He testified further that house wiring can be turned into a TV antenna, although a poor one (328).

Frank Trupia testified that he purchased a TV antenna from Norris in 1973, and that the picture he received with that antenna was inferior to the picture received with the antenna he already had. He added that the television picture with the Norris antenna "was not even good" (332, 335).

Leonard Scrudato testified that he purchased a Norris antenna and "wired it up as I was instructed, and the performance was nonexistent" (469).

Respondents' presented an affidavit and it was stipulated that they had received a communication from a customer expressing satisfaction with the performance of Norris' TV antenna that they had purchased (RX 9AB; Stip. 1821-2).

It is found that respondents' TV antenna will not in all instances bring sharp and clear reception in difficult [47] areas and is not superior to rabbit ear antennas and outdoor antennas and respondents' representations in this respect are false and misleading. Respondents' antenna is not an "electronic miracle" and respondents' representation that it is, is false and misleading.

Respondents' representation that their TV antenna turns the house wiring into an antenna is true. There is nothing in the record to demonstrate under what conditions, if any, utilization of house wiring is ineffective and accordingly respondents' representation has not been shown to be false and untrue.

EX-TAXICABS

49. In their advertisements for cars, respondents[10] made the following statements (see CXs 53, 58; see CX 50, 51, 56):

BUY CHOICE . . . NOT CHANCE

Buy direct and get the carefully maintained car of your choice below wholesale price

All cars are standard four door, six passenger sedans equipped with automatic

* CX 2704, p. 4: "CONCLUSIONS": The C-M Antenna is definitely inferior to the conventional home and "rabbit-ears" antennas used in these tests. It does not serve as an effective TV antenna system in the suburban and fringe areas in which it was tested.

[10] In finding 49 the term respondents refers to Norris, Pan-Am, Jacobs, Williams and Kenneth Mann.

transmissions, heater, defroster and feature durable vinyl interiors. They have been in regularly maintained fleet use and serviced far more frequently than the average car owner can afford to do. Each car has been thoroughly serviced by our mechanics to put it in good operating condition and passes careful inspection before being released for delivery. These top-quality ex-taxis have been carefully selected for best value . . . .

We offer these fine cars at the prices shown (F.O.B., N.Y.). There are no hidden costs! . . . (CX 58).

IDEAL FOR PERSONAL USE OR TO RESELL AT A PROFIT

ONLY PAN AM GIVES YOU THIS 100% O.K.

Dependable PAN AM gives you a good car at a low price. Our highly trained mechanics double-check each car for all the items below. When a car leaves our premises it is checked out as follows: [48]

Brakes	Fan Belt	Heater	Water Pump
Plugs	Spare Tire	Defroster	Fuel Pump
Points	Jack	Generator	Block
Lights	Transmission	Starter	Color
Battery			

MAIL THIS COUPON WITH YOUR DEPOSIT — ORDER AS MANY AS YOU WANT
ALL CARS ARE SOLD ON AN AS IS FIRST ORDER — FIRST SERVE BASIS

In the complaint it is alleged that through their advertisements, especially the statements quoted above, respondents have represented that (Par. 10 (14–23)):

1. cars delivered to purchasers are in good mechanical and physical condition;
2. cars delivered to purchasers are in safe operating condition;
3. cars delivered to purchasers are finished and look as pictured and described in respondents' advertising;
4. cars are checked by expert mechanics and necessary repairs are made prior to release for delivery;
5. cars delivered to purchasers are in sound condition and repair and render normal, adequate and satisfactory service;
6. respondents' cars may be readily resold by the purchasers at a profit;
7. cars are regularly ordered and received in advance of their being offered for sale and are held in stock until purchasers' orders are received;
8. respondents' cars have undergone thorough and complete servicing and inspection before being released and approved for delivery;

9. each price quoted for respondents' motor vehicles is the full price and there are no hidden costs; and
10. respondents bear the liability and responsibility of delivery of cars to purchasers at any destination in the United States where such purchasers may reside. [49]

From a reading of the advertisements in their entirety with special attention to the excerpts set forth above, it is found that respondents do make the representations alleged in the complaint.

Almost all, if not all, of the cars sold by mail-order by Pan-Am were supplied to it by Future Motors. These cars were trade-in taxis from some twenty taxi fleets located in the New York City area. Respondent Mann testified that between 1969 and 1974, Future Motors sold a total of approximately 700 to 800 ex-taxis to Pan-Am, (Mann 214).[11]

After the cars were sold to Pan-Am, Future Motor's personnel serviced them. The service ordered by Pan-Am appeared on service order forms (see RX 32A-I). After such services were performed, the ex-taxis were painted, and "new" tires were installed by Future Motors. These services by Future Motors were performed either before or after the customer-purchaser was known to Pan-Am.

For consumers located in New York State, a State Inspection Certificate was required in order to secure State License application forms.

Ten consumers who had purchased cars from Pan-Am testified about their ordering and the delivery as well as their experience with their cars.

Patricia Berardi, a New York State resident, testified that in 1972 her husband purchased a 1970 Dodge Coronet for $700, ordering by mail from Pan-Am (1131-4). They knew that it was an ex-taxi (1135, 1139). In describing the appearance of the car that she received, Mrs. Berardi said:

The car looked good. Mine happened to be a turquoise color, a nice color green.

The tires looked fine. The car was clean on the outside. It was very dirty in the inside . . . (1138).

She further testified that she had the car ten months. About three months after her car was delivered she had trouble with a loose bolt on the steering box. She returned to Future Motors (at College Point) about four months after she picked it up to have the steering box repaired and, although the [50] personnel there worked on the car,

[11] Pan-Am ceased operations in 1974; only a relatively few car sales were made in that year (Mann 212).

the problem was not solved. She had it repaired at a neighborhood station.

Six months later she experienced trouble starting the car, and a neighbor replaced a "solonoid switch" inside the starter (1141). She also installed a muffler (1141). Thereafter she experienced difficulty with the transmission, "it just wouldn't go into reverse." She gave "it to some friends of my husband for the parts."

Catherine Dyshuk, resident of Scranton, Pennsylvania, testified that in 1972 she and her husband, responding to an advertisement in the Norris catalog (1221), ordered a 1971 Dodge Coronet by mail from Pan-Am for $999 (1214). Her husband, beginning in August, made three trips to New York to pick up the car. He was not successful. On December 17, 1972, the car was delivered to the Dyshuk home (1215). Mr. Dyshuk signed a receipt stating that it was received "in good condition" (1227).

Concerning the appearance of the car, she testified that the paint was already coming off. They did not know they were getting a taxi (1216), but thought they were getting a "fleet car" (1223). The next day they took it to a mechanic who showed them the bent frame of the car and some "dents in the side" (1217–8). She did not drive the car more than twice. Her husband drove the car to work for six months (1219). Then they sold it for $100 (1220).

In early 1972, when Steven Fuchs was a resident of Demarest, New Jersey, he purchased a 1969 Dodge Coronet for $599 from Pan-Am, responding to an advertisement in a Norris catalog (750–1, 755). From his interpretation of the advertisement he thought he would get a "reconditioned fleet car or taxi." "The advertisement portrayed a car which looked to be brand new, and I assumed the car would be reasonably well restored, and it said it did have new parts, and I remember it saying new tires, which is important, and a new paint job as another thing" (752).[12]

Mr. Fuchs picked up the car at College Point, after paying for it at the Norris office in Freeport (753).[13] He test drove the car and told the personnel at College Point that the "brakes barely worked" (753). The car [51] was serviced and "the brakes were a little better but they weren't what I considered safe, but I took the car." (753). "[T]he paint job was totally inadequate." "I noticed that the headlights were not focused. One was facing up and one was facing down, it was loose. The emergency brake didn't work" . . . (753). He

[12] Mr. Fuchs understood the phrase "as is" to mean "the way you receive it" (759).

[13] The invoice signed by Mr. Fuchs reads: "Above car approved and accepted. No warranty expressed or implied" (CX 42 32).

was of the opinion that the tires, which looked new, were "retreads" (769–70).

He kept the car for a couple of weeks and then returned it to Pan-Am and received his money back (755, 758).

John Kurimski, a resident of Stratford, Connecticut, purchased a Dodge car by mail-order in 1971 from Pan-Am for $1000 (1173–4). About six months later the car was delivered to the Kurimski residence in Stratford (1178). He paid the driver $50 (1178). He signed a statement that it was in "good condition" (1186).

Mr. Kurimski had the car for "approximately a year or so, but that thing just stayed in the driveway" (1183). "I don't think I had gone more than a hundred miles" (1183).

As to the kind of car he expected to receive, Mr. Kurimski testified as follows (1183):

> Paint color you wanted, blue or red I think it was, something like that. It sounded good, that's why I got it, but I also expected to be able to make repairs on the car because when you get a used car, naturally there is always some work to be done. You don't get in a condition that good, but not to the extent that when I looked at this thing, what it was going to cost me. This was a piece of junk, period.

He further testified that although the paint job was pretty good, the interior was "a mess" (1178). "The engine was bad, all rusted out." He "tried to get the car going. It wouldn't go, kept stalling." He had it towed to a garage. They "found that the main bearings were gone." They got it going and then on the eight-mile trip home it stalled about ten times (1179).

He and a friend, who was a mechanic, replaced one bearing and found the frame broken and welded. "[T]he [52] weld job was terrible" (1180).[14] In addition he replaced the points, plugs, condenser and timed it, replaced the front ball joints, muffler and carburetor (1182). The total cost of repairs was approximately $300 to $400 (1181).

Mrs. Truus M. Lamanna, a resident of East Norwich, New York, testified that in 1972 they purchased a 1970 four door [Dodge] Coronet from Pan-Am for $700, responding to a catalog advertisement (1098–9; see RX 4). From the ad, they thought a 1970 car should be a pretty good car, being a fleet car which would be constantly serviced, it should be in good condition (1100).[15]

She paid for the car in Freeport and picked it up at College Point at Future [Motors]. She had to go to College Point twice because on

[14] Mr. Kurimski is a welder (1181).

[15] The Lamanna, Lo Motto and Berardi cars were bought as part of one transaction (see 1107). Down payment with the order was made on April 12, 1972, the balance paid July 13, 1972, and the cars were picked up on July 27, 1972 (1109, 1111).

the first visit the car "hadn't been inspected yet" (1102). "It had a new paint job, only the outside, because when you opened the trunk it was still all yellow, and the upholstery was taped up where the mechanism for the cab had been attached" (1102). "The inside was very dirty" (1102).

From the following day she had trouble starting the car, the "starter solonoid" being defective (1102). Within three months "the tires were completely shot, the front" (1104). "One day my whole front went, the whole "A" frame ["K"; see 1109–10] collapsed" (1104).

They had it towed back to College Point, and after two months she got her car back (1105). Six months after picking up the car the first time (late August) she gave the car to some kids "experimenting how to fix cars" (1105).

Upon receipt of the car she signed a statement: "Above car approved and accepted. No warranty express or implied. Any major thing go wrong, may be brought back, repaired at Pan-Am expense" (1111). [53]

Willie Lewis, a resident of Capitol Heights, Maryland, ordered two cars from Pan-Am by mail (1022). In March 1972, he ordered a Dodge Coronet for $699, receiving delivery in June at College Point (1024; see CX 3211). In June he ordered a blue 1970 Dodge Coronet for his wife and picked it up in October (1037). He signed a statement: "Above car approved and accepted. No warranty express or implied" (1052).

In his view the advertisement (CX 55A) to which he responded represented that the cars were "inspected, they were in condition, . . . and guaranteed for thirty days . . . they were very reliable" (1023, 1047). He "expected to receive a car which had been used, but I expected to receive a car that would give me service, adequate service, for a certain length of time without any trouble." Although he knew they were "used" "fleet cars," he didn't see anything in the advertisements about ex-taxis (1044).

While he was driving the first car home, the "lights went out." In July he replaced the "disc brakes" (CX 3212) and later the power steering failed (1030-1). Pan-Am reimbursed him $50 of the $150 cost of repairing the power steering (1032).

In the spring of 1973, the motor blew up and he had that replaced for approximately $300 (1033). He further testified that on the first day he noticed that the voltage regulator was defective (1034). Thereafter he carried a spare generator in his car (1035), and replaced the generator every six months (1035). In the latter part of 1973, he junked that car.

He had to replace the front end of the second car (CX 3218) and

sometime later "one night I was driving it home and, all of a sudden, whoof, the whole dashboard caught fire" (1039). He had other "troubles, minor, but I was able to repair them myself" (1043).

Frank LaManto, a resident of South Farmingdale, Long Island, New York, picked up a 1970 Dodge Coronet in late September 1972 (1118). It was "in a condition of a brand new painted car, a brand new-looking painted car from the outside." The interior "was a little disappointment, but it was still satisfactory" (1118-9). The car had an inspection sticker on it (1119). He signed an invoice dated August 1, 1972, which stated: "Above car approved and accepted. No warranty express or implied" (1129). [54]

He drove it home and noticed a problem with the transmission. The next day he returned it to College Point, where a used transmission from another cab was installed (1120). Approximately four months later the "engine seized" (1121).[16] He replaced the motor four months later at a cost of approximately $600 (1123). Three months later the car developed trouble in the drive train. They sold it for $700 in July 1976 (1125). The car was driven 6000 miles during the seven months it was in running condition (1125).

Carol Orkin, a resident of North Babylon, New York, purchased a 1970 Ford for $700, responding to an advertisement in the Norris Catalog (1059-61). She ordered it in July 1972 and picked it up in February 1973 (1063). From the advertisement "it was reasonable and it was a new car, comparatively. It was only two years old, and I thought it would be a good buy" (1061). "I knew I was buying a fleet car from the advertisement, but I assumed that since it was a fleet car it would be kept up properly . . ." (1062, see 1086).[17] When Mr. and Mrs. Orkin picked up the car it had an inspection sticker on it (1065). On the way home they stopped at a gas station because there were "no brakes on the car." A "master cylinder" was put in the car by the station attendant (1066). She requested a refund on that bill from Norris, but never got a response from them (1072). They kept the car for about a year and finally "resold it to a junkyard for $35.00" (1072).

Charles Weyland, a resident of Freeville, New York, purchased a 1972 used Dodge Coronet from Pan-Am for $999 plus tax (1155–7). He picked up the car at College Point in March 1974. It had an inspection sticker on it (1157). To the best of his recollection he did not see "ex-taxis" in the advertisement (1166).

He drove the car from College Point to a nearby gasoline station to

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[16] "It's a condition that happens when the engine runs completely out of oil and there is nothing to indicate that" (1121).

[17] They were aware that fleet car may mean ex-taxis (1087).

get gasoline. The car failed to restart. The gas station secured the positive terminal of the battery (1158). Shortly after he continued his trip home, the brakes on the right front "seized" (1158). He returned to College Point, [55]

The service people at College Point replaced the battery and the front brakes and bearings, obtaining parts from other cabs, as well as a hanger on the exhaust pipe or muffler (1159).

On the way home the car overheated. The radiator had to be flushed out and the anti-freeze replaced (1160). Shortly thereafter they discovered a hole in the floor board (1160). He had further front brake trouble and had to have the "spider gears" replaced (1161). The paint started to peel in 1975 (1163). They gave it to a dealer to resell (1163).

George Roberts, a resident of Springfield Gardens, New York, ordered a car by mail from the Norris catalog for $795 (713–4). He picked it up in May 1970 (715). He testified that if he had known it had been a "taxi," he would never have invested or decided to buy it (7160). The service people attached an inspection sticker to the car while Mr. Roberts was signing papers (717).

Upon driving it away, Mr. Roberts discovered that the brakes didn't work. He backed it to the College Point service area and they adjusted the brakes (718).

Two and a half months later he was stopped by a policeman for having an invalid inspection sticker on the car. Because it would require $300 repairs to get a valid inspection sticker, Mr. Roberts sold the car to the mechanic at the inspection station for $75 (721).

In a number of instances, cars delivered to purchasers are not in good mechanical condition and respondents' unqualified representation that they are, is false and misleading.

In a number of instances, cars delivered to purchasers are not in safe operating condition, and respondents' unqualified representation that they are, is false and misleading.

In a number of instances, it appears that the cars have not been serviced and necessary repairs had not been performed before release for delivery and respondents' unqualified representation that inspection, service, and repairs are performed in advance of delivery is false and misleading. [56]

In a number of instances, cars delivered to purchasers are not in sound condition and repair and have not rendered normal, adequate and satisfactory service. Respondents' representations as to the condition of the cars they sell is false and misleading.

In a number of instances respondents' cars have not undergone thorough and complete servicing and inspection before being

released for delivery and respondents' representation that such servicing and inspection is always performed is false and deceptive.

It appears that in many instances the cars ordered by customers by mail are not in stock, but are obtained as available to fill orders. Respondents' representation that they are offering for sale cars that are in stock is false and misleading.

It appears that all of respondents' cars are not in such condition that they may be sold at a profit by the purchaser. In many instances purchaser had to expend substantial sums of money in repair costs. Respondents' unqualified representation that such profit may be realized is false and misleading.

Respondents' cars are repainted on the exterior before they are delivered to purchasers. Generally, the appearance of the cars was as pictured in the catalog advertisements. However, the interiors are not refinished. There is no overt representation that they have been so serviced. Respondents' have not misrepresented the *appearance* of the cars which they sell.

Each price quoted for respondents' cars is the full purchase price except for the tax (for New York residents). The delivery charge for delivery to the purchasers' home is stated in the advertisements. Except for the necessary repairs that a customer might be required to make, there are no hidden costs. In my opinion, the "hidden costs" refer to the original price and not to subsequent repair costs, and respondents have not misrepresented the purchase price of their cars.

There is no evidence as to who bears the liability and responsibility of delivery and accordingly there is no proof that respondents' representations that they do, is actually false. [57]

It is further alleged in the complaint that respondents have failed to make known to the prospective purchaser certain material facts about their cars.

First, it is alleged that respondents do not disclose that the cars are "ex-New York City taxicabs." In their advertisements, respondents do state that their "fleet cars" are "ex-taxis." The additional disclosure that they are ex-New York City taxicabs is a material fact and failure to make this disclosure is unfair and has a tendency and capacity to mislead the prospective consumer.

Second, it is alleged that respondents advertise that their cars are sold "FOB New York" and "As is," without disclosing the meaning of those terms. There is no evidence that respondents have made any representation that their cars are sold on other terms. Absent some ambiguity, sellers are not required to define words that have well-known and particular meaning.

Third, the complaint alleges that respondents do not disclose that the cars are not inspected for compliance with any state motor vehicle inspection law. The record discloses that the cars sold to New York State residents have inspection stickers attached thereto. There is some ambiquity in the advertisements as to what "inspection" is represented as having been performed. It would appear that state law covers the inspection requirements and to require further disclosure in advertisements would create more confusion as to what is actually a fact.

Fourth, the complaint alleges that the interiors of respondents' cars have not been cleaned or reconditioned prior to being delivered to the purchaser. In fact, it appears that the interiors are not reconditioned. This is a material fact and failure to disclose it, especially in view of the other representations relating to the condition of the cars, is unfair and had a tendency and capacity to deceive.

Finally, the complaint alleges that respondents have failed to disclose that the drivers hired to deliver cars to purchasers are independent contractors and are not respondents' agents, servants or employees. The record does not demonstrate that failure to make this disclosure is important. There does not appear to be any serious ambiguity in the advertisement that would require this disclosure, and it is found that any such fact is not material to the purchasers' choice of whether to buy respondents' cars. [58]

Discussion

About respondents' liability

The acts and practices challenged in this proceeding are primarily the acts and practices arising from the business operations of corporate respondent Norris. It is clear that respondents Jacobs and Williams are responsible for these acts and practices in their individual capacities, as well as corporate officials, for purposes of enforcement of Section 5 of the Federal Trade Commission Act. They control the policies of the corporation and direct its operations. See *Standard Educators, Inc.* v. *Federal Trade Commission*, 475 F.2d 401 (D.C. Cir. 1973), *cert. denied*, 414 U.S. 828; *Guziak* v. *Federal Trade Commission*, 361 F.2d 700, 704 (8th Cir. 1966), *cert. denied*, 387 U.S. 1007 (1965).

None of these general practices are attributable to Pan-Am or Kenneth Mann. The only business that they are engaged in is the mail-order business of selling used cars. Of course, respondents Jacobs, Williams and Mann are responsible individually and as

corporate officers for the acts and practices of Pan-Am. *Federal Trade Commission* v. *Standard Education Society*, 302 U.S. 112 (1937).

The other two corporate respondents had nothing to do with the challenged practices. Complaint counsel concede as much (CSC PF pp. 47–48). Without further discussion, the complaint will be dismissed as to the two corporate respondents Federated Nationwide Wholesalers Service, Garydean Corp., t/a Nationwide Wholesaler Service, and P–N Publishing Company, Inc.

The only remaining question as to respondents' responsibility for the challenged acts and practices is the relationship between Norris and Pan-Am. Although it was conceded that Norris was not in the business of selling cars (see tr. 66), the advertisements of Pan-Am appeared regularly in the Norris catalog and Pan-Am's business was conducted by Norris personnel at the Norris place of business (see Cxs 752–54, 756). In the circumstances, the practices of Pan-Am which arose out of advertisements in the Norris catalog (see CXs 57, 409, 410) are found also to be the responsibility of Norris, for purposes of enforcement of the Federal Trade Commission Act. See *Sunshine Art Studios, Inc.* v. *Federal Trade Commission*, 481 F.2d 1171 (1st Cir. 1973). [59]

About the Commission's jurisdiction

There is no dispute that the Federal Trade Commission has jurisdiction over the respondents Norris, Pan-Am, Jacobs, Williams and Mann. They are engaged in commerce within the meaning of the Federal Trade Commission Act, and the challenged acts and practices are in commerce and affect commerce within the meaning of that Act.

Meaning of the advertisements

With several exceptions, it has been found that the advertisements conveyed the meanings set forth in the complaint. This determination has been made from carefully considering the advertisements, including the format and the emphasis placed on certain words and phrases contained therein. It is well established that the meaning of an advertisement may be determined by an examination of the advertisement itself. *Carter Products, Inc.* v. *Federal Trade Commission*, 323 F.2d 523 (5th Cir. 1963); *J. B. Williams Co., Inc.* v. *Federal Trade Commission*, 381 F.2d 884 (6th Cir. 1967).

Such a determination may be made notwithstanding that the advertisements may have other meanings. Implications and infer-

ences may be made from statements actually made as well as from information not set forth therein, if the excluded facts are material, *i.e.*, facts considered to be material to the customers' choice whether to purchase the product advertised. *Chrysler Corp.* v. *Federal Trade Commission*, D.C. Cir. decided July 6, 1977 slip opinion at p. 12; *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374 (1965).

Respondents do not seriously contest the issues as to whether the challenged advertisements conveyed the alleged meanings. They do point out that with respect to the FLAME GUN advertisements the words "in seconds" do not appear therein, and argue that the alleged meaning which contains "in seconds" should not be interpolated from the advertisement (Resp. PF pp. 27–28). This advertisement uses such phrases as "fastest way we know" and "faster than you'd believe possible." Speed of performance is the theme. That is close enough.

About the performance characteristics of products

Respondents argue that complaint counsel have not proved that the performance characteristics of the products [60] are not as represented so as to render the challenged advertising false, deceptive or misleading in violation of the Federal Trade Commission Act.

With respect to the FLAME GUN, respondents argue that the test conducted by Mr. Lomash was limited to two one foot square sections of ice at zero degrees (0°) and that his test did not duplicate the environment or conditions which an ordinary consumer might encounter (Resp. PF pp. 30–32). In respondents' view the testimony of the three consumer witnesses should be disregarded because they were not competent to testify as to the technical or scientific validity of the claims made for the product and that they had no way of knowing whether the units they were using were not defective (Resp. PF pp. 28–29).

In my opinion the evidence of record is competent to support the finding that the FLAME GUN could not perform as represented in the advertisement. The burden shifted to respondents to come forth with some information in support of their claims. They did not do so.

The same situation exists with respect to the TV antenna. The test conducted by Mr. Tripolo at least demonstrated that the TV antenna did not produce the results as represented in respondents' unqualified advertisements. The fact that the TV antenna may have worked, as promised, in certain other areas of use, does not make the unqualified representation truthful as to all possible consumers.

As shown by the findings on the other products' performance characteristics, respondents' representations were to a great extent exaggerations or statements of true facts in a way that they had a tendency and capacity to mislead. In my opinion complaint counsel have sustained their burden of proof and without rebuttal evidence the record is sufficient to support these findings.

About general practices relating to the mail-order business

One of respondents' principal defenses to the allegations relating to nondelivery of merchandise and their failure to make prompt refunds centers around the relatively few complaints attributed to them compared to the great number of orders they process every year. Contending that the [61] complaints are inconsequential in terms of respondents' overall volume and operation of its business, respondents assert that the evidence offered herein by complaint counsel, involving a relatively minute percentage of the consumers which the company must deal with on a day-to-day basis, does not rebut the evidence of respondent Norris and its officers as to the policies, practices and procedures of the company to filling orders and making refunds promptly. Respondents concede that there are bound to be some mistakes which is part of the nature of the mail-order business (Resp. PF p. 21), but contend that Norris did not have such an unusual complaint record (Resp. PF p. 19) that would warrant a finding that they violated the provisions of the Federal Trade Commission Act.

In my opinion, it is respondents' regular business policies, practices and procedures that engender the basic "unfairness" in certain practices found in this matter. Respondents candidly admit that they cannot trace their shipments and accordingly cannot ascertain whether delivery of merchandise has been made. In response to complaints or inquiries about delivery they regularly make the assumption that the merchandise has been shipped and will be delivered soon. They do not check their records to see if shipment was actually made. They do not follow up to see if delivery was in fact subsequently accomplished. They assume that if nothing further is heard from the consumer, delivery was accomplished.

With respect to refunds, respondents take the position that if they received the returned merchandise, a refund was made, and conversely, if they did not send a refund, they did not receive the returned merchandise. They apparently make no automatic refunds on complaints that merchandise was not delivered, but eventually make a reshipment or refund after subsequent complaints are received.

The inherent unfairness in these procedures is that although the prospective customer is promised in respondents' advertisements that (1) they order at "no risk," (2) that delivery is "guaranteed" and (3) that the customer must be satisfied or his money will be refunded, respondents do not take the initiative in living up to these promises. If something goes amiss, the customer may be placed in a position where he must "hassle" respondents for the merchandise or the refund. In the circumstances, the incidents of complaints, [62] although perhaps relatively few in number as compared to the orders handled, cannot be termed "inconsequential." If any customer is placed in a position where he must "fight" for delivery or a refund, it is no excuse for respondents to say that the problems are part of the nature of the mail-order business. The answer is, and the Federal Trade Commission is mandated, to put a stop to the unfair practices.

Weight to be given testimony by consumer agency witnesses

Respondents contend that the testimony of the consumer agency witnesses must be afforded no weight and disregarded because it was founded on rank hearsay and cannot be relied upon as to the validity of the complaints reported (see Resp. PF p. 18). This testimony was not received for the truth of the complaints themselves, but for the fact that Norris' practices, the ones challenged in this proceeding, had often come to the attention of the consumer agencies. This merely tends to establish that the problem was more consequential than as established by the number of consumer witnesses who testified.

Except for the fact that the New York Attorney General's Office and the "Metropolitan Better Business Bureau" had forwarded consumer's letters of complaint to the Federal Trade Commission, no reliance was given to the testimony of Ms. Susan Metzger, Consumer Protection Specialist, Federal Trade Commission. The charts that she prepared were at the direction of complaint counsel for purposes of determining what possible allegations were to be included in a complaint, at that time still to be drafted. As demonstrated during cross-examination, it was difficult if not impossible for her to decipher the specifics of the consumer's complaint from the information on the charts. The degree of reliability of these exhibits was not such as to justify inclusion of them as evidence of record in this proceeding (see ALJ 1601-2).

About violations of the Federal Trade Commission Act

It is well settled that any advertising representation that has the

tendency and capacity to mislead or deceive a prospective purchaser is an unfair and deceptive act and practice which violates the Federal Trade Commission Act. *Chrysler Corp.* v. *Federal Trade Commission*, D.C. Cir. No. 76-1586, *decided* July 6, 1977 at slip op. 12; *Charles of the Ritz Dist. Corp.* v. *Federal Trade Commission*, 143 F.2d 676, 679-80 (2d Cir. 1944). [63]

It is also a violation of the Federal Trade Commission Act to fail to disclose facts relevant to the advertising representation that, if known to the prospective purchaser, might affect his decision as to whether to purchase the advertised product. *Colgate-Palmolive Co., supra.*

The Federal Trade Commission may determine that certain practices are "unfair" when a seller does not live up to certain representations as to his performance in filling orders. See *Federal Trade Commission* v. *Sperry & Hutchinson* 405 U.S. 233 (1972). It is an unfair trade practice to retain moneys of consumers where performance on the transaction is not accomplished. *Windsor Distributing Co.*, 77 F.T.C. 204, *aff'd*, *Windsor Distributing Co.* v. *Federal Trade Commission*, 437 F.2d 443 (3d Cir. 1971).

In addition to the above type of "unfair" practices, complaint counsel contend that it is "unfair" for respondents not to maintain a telephone listing in a local telephone directory. They argue that consumers should be able to reach respondents by telephone in order to make complaints as to delivery or refunds.

I am not aware of any prior case, adjudicative or non-adjudicative, wherein respondent was held to have engaged in an unfair practice by *not* maintaining a public listing of its telephone or was ordered to maintain a public listing of its telephone number. Although it appears that the Commission's staff was concerned about this problem when it drafted the statement of basis and purpose of the Proposed Trade Regulation Rule on Mail Order Merchandising, the promulgated Rule does not contain any such requirement.

The Commission's promulgation of the Rule does not control this adjudicative proceeding, wherein determinations as to illegal conduct and appropriate remedies are made on the adjudicative record.

It certainly would be unfair for a seller to isolate himself from the consumer after the consumer has ordered and paid for a product and where the seller has guaranteed certain performance on the seller's part. But I do not think it is unfair merely to maintain an unlisted telephone, where other means of communication are available. Considering [64] the testimony of Mr. Fenvessey, as well as respondents' candid description of their procedures in processing

orders and complaints, it would not appear very useful to *require* a general listing of their telephone number. The confusion and frustration that a great number of telephone inquiries would engender, if not processed properly, is not hard to imagine.

Coupled with the "telephone" issue, is the question of what type of response respondents should make to inquiries or complaints relating to delivery or refunds. In this respect, another question is what records respondents should maintain in order to upgrade their procedures for handling complaints and request for refunds. As pointed out above (see findings 22, 26; disc. p. 61), respondents, although they maintain computer information, do not use it to ascertain the status of the transaction that is subject to complaint or inquiry. The Trade Regulation Rule does require specific record keeping that would disclose such facts as well as respondents' actions on the complaints and inquiries. It may be that respondents, without much difficulty, could alter their computer capability to provide the information retrieval necessary for compliance with such requirements. There is no doubt that they must do something if they continue to make the representations that engendered the complaint in this matter.

Respondents contend that their practice of having customers document their purchase before respondents will process their claim for refund or reshipment is not unfair, in that most retail stores require presentation of the sales slips before making refunds on goods returned. But a retail store which provides a sales slip and a face-to-face confrontation between the customer and the seller, is in a different situation than a mail-order business that sells merchandise unseen, prepaid, by mail. As long as respondents represent that the customer will get a refund or that delivery is guaranteed, they cannot require the return of cancelled checks or other such proof of payment, as a condition for their acting on a complaint, unless they disclose to the customer in the original contact that such proof will be required before reshipment or refund is made.

Thus, failure to keep adequate records of mail orders is an unfair trade practice and a mail-order business can be required to maintain such records. In the circumstances of this case, failure to maintain a telephone listing is not by itself an unfair practice. [65]

The "telephone" issue has one more dimension. Once a customer does complain about nondelivery or failure of refund, it is an unfair practice not to provide them with a telephone number for future contacts. I think that at some posture of the transaction, respondents should disclose their telephone number. This is taken up in the remedy section which follows (see p. 73).

CONCLUSIONS

1. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of respondents Norris, Pan-Am, Jacobs, Williams and Mann.

2. This proceeding is in the public interest. The Commission so determined upon the assumption of jurisdiction through the issuance of the complaint. *American Airlines, Inc.* v. *North American Airlines, Inc.*, 351 U.S. 79, 83 (1956). Nothing in the record or findings requires a different determination. See *Federal Trade Commission* v. *Klesner*, 280 U.S. 19 (1929).

3. The individual respondents formulated, directed and controlled the acts and practices of the corporate respondents of which they were officers, including the acts and practices found herein.

4. Respondents Norris, Jacobs and Williams engaged in the following acts and practices as alleged in the complaint. They misrepresented that —

a. merchandise paid for by a certified check is always shipped to purchasers immediately;

b. merchandise paid for by a non-certified check is always shipped to purchasers about two weeks after said check has been approved for payment at the purchaser's bank;

c. the full purchase price of the product plus all additional charges paid by the purchaser in connection with said purchase are refunded by respondents if the purchaser is dissatisfied for any reason;

d. a sum of money in the form of cash, check, money order or other negotiable currency is always refunded to purchasers if they are dissatisfied for any reason; [66]

e. pursuant to respondents' 30-day money back guarantee, purchasers will always receive a full refund if the merchandise is returned to respondents within 30 days from the date of the purchaser's receipt of said merchandise;

f. in a substantial number of cases, the non-delivery of the purchaser's order, is caused by the United States Postal Service;

g. exchanges or refunds are always expeditiously processed by respondents;

h. all parcels shipped to purchasers, except those items marked express collect, are insured against loss, damage or other casualty by respondents.

In addition, these three respondents misrepresented that—

a. the "JN INSTA-JET PROPANE FLAME GUN" is able to whip through the heaviest snow drifts and the thickest ice in seconds and is

effective and efficient in clearing walks and driveways of ice and snow;

b. respondents' roach powder is safe to use;

c. respondents' roach powder gets rid of roaches once and for all;

d. respondents' roach powder creates a deadly chain reaction which eliminates and kills roaches and eggs;

e. the manufacturer has unconditionally guaranteed that respondents' roach powder prevents reinfestation when used as directed and left in place or it will refund money;

f. respondents' roach powder does not lose its capacity to kill under any conditions of use;

g. respondents' TV antenna will bring sharp and clear reception even in difficult areas;

h. the performance of respondents' TV antenna is superior to any rabbit ear antenna or outdoor antenna; [67]

i. respondents' TV antenna is an electronic miracle;

j. respondents' "FIVE YEAR FLASHLIGHT" carries an absolute 5-year guarantee;

k. respondents' Lincoln-Kennedy penny was minted by the United States Treasury Department;

l. respondents' Lincoln-Kennedy penny is a coin of historical and numismatic significance which is certain to grow in value;

m. the issuance of respondents' Lincoln-Kennedy penny was sanctioned by Section 331, Title 18, U.S. Code;

n. a free plaque containing historical coincidence between the lives of President Lincoln and President Kennedy is provided to purchasers with each coin order.

In addition, these three respondents have failed to disclose the following material facts in their advertising that —

a. initial purchase of respondents' flame gun does not include the propane cylinder mentioned in respondents' advertisements of its flame gun. The propane cylinder, which is an essential component of the flame gun, must be purchased at an additional cost;

b. respondents' roach powder is 50% boric acid and 50% inert ingredients;

c. respondents' roach powder is hazardous. The product may be harmful to human beings and pets. Special precautions should be taken in the use of this product;

d. respondents' flashlight has an on life of 10 to 20 hours;

e. the manufacturer's guarantee of respondents' flashlight is not absolute. The manufacturer guarantees that the light can be stored and remain usable for 5 years or operate for a total of ten hours whichever comes first. [68]

In addition, these three respondents engaged in the following acts and practices —

a. deposited purchasers' checks and money orders into their bank accounts within three days to one week from receipt of such checks and money orders and have failed to either ship the merchandise ordered or to refund money for one month to one year;

b. failed to answer letters of inquiry from consumers or have made inadequate responses which have thereby delayed or prevented purchasers, seeking deliveries of merchandise or refunds of their money, from obtaining same;

c. placing the burden of record keeping upon the purchasers who, upon seeking a refund, exchange, or delivery of the advertised merchandise ordered and paid for by them, have been required by respondents to provide copies of their cancelled checks, original order blanks or various correspondence received from respondents as well as the full details pertaining to the merchandise ordered such as the size, color, price, style number and the date the order was placed.

5. Respondents Norris, Jacobs, Williams, Pan-Am and Mann engaged in the following acts and practices as alleged in the complaint. They misrepresented that —

a. cars delivered to purchasers are in good mechanical and physical condition;

b. cars delivered to purchasers are in safe operating condition;

c. cars are checked by expert mechanics and necessary repairs are made prior to release for delivery;

d. cars delivered to purchasers are in sound condition and repair and render normal, adequate and satisfactory service; [69]

e. respondents' cars may be readily resold by the purchasers at a profit;

f. cars are regularly ordered and received in advance of their being offered for sale and are held in stock until purchaser orders are received;

g. respondents' cars have undergone thorough and complete servicing and inspection before being released and approved for delivery.

In addition, these five respondents have failed to disclose that —

a. respondents' cars are ex-New York City taxicabs;

b. interiors of motor vehicles have not been cleaned or reconditioned by respondents prior to their being offered for sale.

6. The aforesaid acts and practices of respondents have the tendency and capacity to mislead and deceive the public and constitute unfair methods of competition and unfair and deceptive

acts and practices in commerce or affecting commerce in violation of the Federal Trade Commission Act.

7. In all other respects the allegation of the complaint as to violation of the Federal Trade Commission Act have not been sustained by the evidence or as a matter of law.

REMEDY

The Commission is vested with broad discretion in determining the type of order necessary to insure discontinuance of the unlawful practices found. *Federal Trade Commission* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 392 (1965). The Commission's discretion is limited only by the requirement that the remedy be reasonably related to the unlawful practices found. *Jacob Siegel Co.* v. *Federal Trade Commission*, 327 U.S. 608, 613 (1946); *Warner Lambert Co.* v. *Federal Trade Commission*, D.C. Cir. No. 76-1138 (decided August 2, 1977) (slip opinion at page 24); *Niresk Industries Inc.* v. *Federal Trade Commission*, 278 F.2d 337, 343 (7th Cir. 1960), *cert. denied*, 364 U.S. 883. [70] The Commission is not limited to prohibiting the illegal practices in the exact form in which they were found to have been employed in the past and may close all roads to the prohibited goal. *Federal Trade Commission* v. *Ruberoid Co.*, 343 U.S. 470, 473 (1952); *Federal Trade Commission* v. *National Lead Co.*, 352 U.S. 419 (1957).

Counsel supporting the complaint have proposed an order to cease and desist that is somewhat narrower than the proposed order that accompanied the complaint (CSC PF pp. 81-96). Respondents in their proposed findings, although objecting to any order on the grounds of failure of proof, have specifically challenged certain features of the originally proposed order (Resp. PF pp. 101-117; see Resp. Ans. Par. 16, items a-r).

In the following discussion the new order proposed by complaint counsel will be used as a frame of reference. However, because many changes are required to conform the order to the findings in this decision as well as the requirements of law, the proposed order that follows is substantially different in format and content.

Pan-Am and Mann were not found to have been engaged in the general business practices attributable to Norris, Jacobs and Williams and which were found to be in violation of the Federal Trade Commission Act. Accordingly, the preamble to the principal portion of the order to cease and desist (Part I) relating to such practices will not include Pan-Am and Mann. On the other hand, those paragraphs of the order relating to practices in the sale of used cars by mail order (Part II) will run to Norris, Jacobs, Williams, Pan-

Am and Mann. All the above respondents will be subject to the general requirements of Part III of this order.

Respondent Mann contends that nothing in any order issued should relate to his business as an officer of Future Motors. It does not appear that Future Motors is engaged in a mail-order business. With the order limited to "mail-order sales" Mr. Mann's compliance should not involve him in his other capacity, unless Future Motors enters the mail-order business. Of course, Mr. Mann's future involvement in any mail-order business must be subject to the limited requirements of the order as it relates to him. [71]

Some of the prohibitions of complaint counsel's proposed order create absolute requirements on respondents irrespective of any representation they might make in their advertisements in the future. Such subjects as refunds and affirmative disclosures on respondents' flashlights and roach powder fall into this category. The requirements as to what makes up the refund total, *i.e.*, everything tendered at the time of the order, is proper only where respondents make a general money back guarantee. If they state exactly what will be refunded, they should not be required to refund more. Requirements as to disclosure of the "on time" life of the flashlight should be required only if respondents represent in any way the life expectancy of a battery or power source. Requirements in advertising as to the hazards of roach powder should be required only if respondents represent in any way that the product is safe (Compare CXSC Proposed Order Pars. 1, 3, 11, 12, 13; I.D. Order Par. 1, 3, 12, 13, 15).

Respondents object to paragraphs 4, 5 and 6 of counsel's proposed order on the grounds that those paragraphs are almost exactly the requirements of the Commission's Trade Regulation Rule for Mail-Order Merchandising, and that they are already required to comply with those requirements. They contend that they should not be subjected also to possible enforcement sanctions of a cease and desist order.

The illegal practices in which respondents were found to have engaged support these order provisions. It is proper for the Commission to include them in an order. They are reasonably related to the practices and close all roads to the prohibited goal. In effect, using the exact language insures that, except for a different enforcement posture, all members of the industry are subject to the same requirements.

In my opinion the "reasonable basis" requirement of Par. 4 relating to the availability of merchandise advertised for sale is

proper, and the requirement that respondent document this "reasonable basis" is not onerous.

Complaint counsel propose a paragraph that requires respondents to have a "reasonable basis" to support any advertising claim they may make for the safety, efficacy, performance, content or any characteristic of any product. Respondents claim that the Commission does not have the power to issue such a prohibition in that it would penalize them for statements which were in fact true, and that in any event such a requirement is so vague and burdensome that it cannot be justified in this case. [72]

There is no doubt that the Commission has the power to require an advertiser to have a reasonable basis at the time claims are made concerning the technical attributes of any product. See *Firestone Tire & Rubber Co.* v. *Federal Trade Commission*, 481 F.2d 246 (6th Cir. 1973); *Fedders Corp.* v. *Federal Trade Commission*, 529 F.2d 1398, 1400–1 (2d Cir. 1976). However, as a practical matter, those cases where the Commission has applied the so-called "reasonable basis" substantiation involved complicated scientific data. The proposed paragraph requires a mail-order business to have "competent scientific tests" or "competent objective material" as a reasonable basis for all advertising claims for *all products* that it offers for sale. While it is true that respondents were found to have made claims for some of their products which were found to be false and misleading, the "reasonable basis" requirement of the order is too broad. In my opinion that paragraph should be modified to limit "reasonable basis" documentation to possession of and reliance on "competent objective material". In other words, respondents must rely upon something objective before making any product claims. See *Fedders, supra*, 529 F.2d at 1403–4.

Complaint counsel also include a paragraph that would require respondents to disclose the actual shipper of the merchandise, when they are not the shipper. The record in this case does not establish that failure to make this disclosure is "unfair." Clearly the other paragraphs of the order should eliminate any problem purchasers might encounter where goods are not shipped by respondents. Respondents deal with customers, will be the subject of the customer's complaint, and will be responsible for delivery or refund. Paragraph 8 of the proposed order will be deleted.

Respondents point out that the Commission's challenge to their Lincoln-Kennedy penny advertising duplicates, in all major respects, the issues raised in the proceeding brought by the United States Postal Service against them before the issuance of the complaint in this matter. (Resp. PF at pp. 61–63; see Finding 47, *supra*). They

argue that the Commission's entry of an order to cease and desist as to their Lincoln-Kennedy penny advertisements is improper and unnecessary.

There is nothing improper in the Commission's proceeding under Section 5 of the Federal Trade Commission Act in areas already covered by Postal Service orders. There are many basic and material differences in the laws administered by the two public agencies. See *Reilly* v. *Pinkus*, 338 U.S. 269, 277 (1949); *Damar Products, Inc.*, 59 F.T.C. 1263 (1961), *aff'd, Damar Products, Inc.* v. *Federal Trade Commission*, 309 F.2d 323 (3d Cir. 1962). [73]

Respondents also argue that certain challenged practices should not be the subject of adjudication because they will be the only mail-order company subject to specific regulation. These areas, argue respondents, must be the subject of Rule Making Procedures (Resp. PF pp. 12, 82, 106–7, 115). The Commission is not estopped from proceeding by way of adjudication because a matter may also be the proper subject of Rule Making. Such a decision is for the Commission as a matter of policy. Insofar as respondents may be disadvantaged competitively from the strictures of an order to cease and desist, those caught violating the Federal Trade Commission Act must expect some fencing in. It should be pointed out, however, that the Commission, under the amendments contained in the Federal Trade Commission Improvement Act, may extend some proscriptions of the order issued against respondents to other mail-order businesses. See 15 U.S.C. 45(m)(1)(B).

In my opinion, complaint counsel's proposed order does not adequately cover the substantive unfair and deceptive advertising practices in which respondents were found to be engaged in connection with the offering for sale, sale and distribution of their FLAME GUN, LINCOLN-KENNEDY PENNY, TV ANTENNA, ROACH POWDER, and used automobiles. Paragraphs have been added which prohibit these specific practices.

Complaint counsel's proposed order does not prohibit misrepresentations that the consumer will receive something "free" in connection with the purchase of a product. A paragraph will be added covering this practice.

Respondents have been found to have misrepresented that they insure the shipments to customers. Complaint counsel recommend dropping the paragraph in the notice order (Par. 8) which relates to this practice. It will be retained in part.

The record-keeping requirements of the order are proper and the record in this case clearly demonstrates the need for such requirements.

Appendix B

As found above, respondents did not violate the Federal Trade Commission Act by using different corporate names, and in my opinion they are not required to "list" their telephone number in a local telephone directory. However in all correspondence relating to complaints they should disclose their telephone number, if, in fact, they do have a telephone. The order will be modified accordingly.

Finally, there is nothing improper or burdensome about the 30-day prior notice requirement as to any proposed change in the status of any respondent. [74]

ORDER

I

It is ordered, That Jay Norris Corp., a corporation, its successors and assigns, and Joel Jacobs and Mortimer Williams individually and as officers of said corporation, and respondents' officers, agents, representatives and employees directly or through any corporation, subsidiary, division, trade style, or other device, in connection with the advertising, offering for sale, sale and distribution of general mail-order merchandise in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Failing to refund the amount required by paragraph 3, *infra*, in connection with the purchase of respondents' merchandise within the time specified in respondents' advertisements. If no time is specified, such refund must be made promptly.

2. Failing to disclose clearly and conspicuously in all advertisements or other promotional material, any charges to be paid by the purchaser for postage, insurance or for any other purpose in connection with the shipment or the return of merchandise. [75]

3. Failing to refund the full purchase price, of merchandise including postage, insurance, handling, shipping, or any other fee or charge paid by the purchaser any time refund is made to purchaser, unless respondents clearly state in their advertisement the exact nature of the refund including any items of the purchaser's expense that will not be refunded.

4. (A) Soliciting any order for the sale of merchandise to be ordered by the buyer through the mail unless, at the time of the solicitation, respondents have a reasonable basis to expect that they will be able to ship any ordered merchandise to the buyer: (1) within the time clearly and conspicuously stated in any such solicitation, or (2) if no time is clearly and conspicuously stated, within thirty (30) days after receipt of a properly completed order from the buyer; and

Appendix B

(B) Providing any buyer with any revised shipping date, as provided in paragraph 5 of this order unless, at the time any such revised shipping date is provided, respondents have a reasonable basis for making such representation regarding a definite revised shipping date; or [76]

(C) Informing any buyer that they are unable to make any representation regarding the length of any delay unless (1) respondents have a reasonable basis for so informing the buyer and (2) respondents inform the buyer of the reason or reasons for the delay.

A reasonable basis, for the purpose of this section, shall consist of records or other documentary proof establishing the use of systems and procedures which assure the shipment of merchandise in the ordinary course of business within any applicable time set forth in this order.

5. (A) Where respondents are unable to ship merchandise within the applicable time set forth in paragraph 4(A) above, failing to offer to the buyer, clearly and conspicuously and without prior demand, an option either to consent to a delay in shipping or to cancel his order and receive a prompt refund. Said offer shall be made within a reasonable time after respondents first become aware of their inability to ship within the applicable time set forth in paragraph 4(A), but in no event later than said applicable time.

(1) Any offer to the buyer of such an option shall fully inform the buyer regarding his right to cancel the order and to obtain [77] a prompt refund and shall provide a definite revised shipping date, but where respondents lack a reasonable basis for providing a definite revised shipping date the notice shall inform the buyer that respondents are unable to make any representation regarding the length of the delay.

(2) Where respondents have provided a definite revised shipping date which is thirty (30) days or less later than the applicable time set forth in paragraph 4(A), the offer of said option shall expressly inform the buyer that, unless respondents receive, prior to shipment and prior to expiration of the definite revised shipping date, a response from the buyer rejecting the delay and cancelling the order, the buyer will be deemed to have consented to a delayed shipment on or before the definite revised shipping date.

(3) Where the respondents have provided a definite revised shipping date which is more than thirty (30) days later than the applicable time set forth in paragraph 4(A), or where the respondents are unable to provide [78] a definite revised shipping date and therefore inform the buyer that they are unable to make any representation regarding the length of the delay, the offer of said

option shall also expressly inform the buyer that his order will automatically be deemed to have been cancelled unless (a) respondents have shipped the merchandise within thirty (30) days of the applicable time set forth in paragraph 4(A) above, and have received no cancellation prior to such shipment, or (b) respondents have received from the buyer within thirty (30) days of said applicable time, a response specifically consenting to said shipping delay. Where the respondents inform the buyer that they are unable to make any representation regarding the length of the delay, the buyer shall be expressly informed that, should he consent to an indefinite delay, he will have a continuing right to cancel his order at any time after the applicable time set forth in paragraph 4(A) by so notifying respondents prior to actual shipment.

(4) Nothing in this paragraph shall prohibit respondents when they furnish a definite revised shipping date to paragraph 5(A)(1) above, [79] from requesting, simultaneously with or at any time subsequent to the offer of an option pursuant to paragraph 5(A), the buyer's express consent to a further unanticipated delay beyond the definite revised shipping date. *Provided, however,* that where respondents solicit consent to an unanticipated indefinite delay the solicitation shall expressly inform the buyer that, should he so consent to an indefinite delay, he shall have a continuing right to cancel his order at any time after the definite revised shipping date by so notifying respondents prior to actual shipment.

(B) Where respondents are unable to ship merchandise on or before the definite revised shipping date provided under paragraph 5(A)(1), and consented to by the buyer pursuant to paragraphs 5(A)(2) and 5(A)(3), failing to offer to the buyer, clearly and conspicuously and without prior demand, a renewed option either to consent to a further delay or to cancel the order and to receive a prompt refund. Said offer shall be made within a reasonable time after respondents first become aware of their inability to ship before the said definite revised date, but in no event later than the expiration of the definite revised shipping date. *Provided, however,* [80] that where respondents previously have obtained the buyer's express consent to an unanticipated delay until a specific date beyond the definite shipping date, pursuant to paragraph 5(A)(4) or to a further delay until a specific date beyond the definite revised shipping date pursuant to paragraph 5(B), that date to which the buyer has expressly consented shall supersede the definite revised shipping date for purposes of paragraph 5(B).

(1) Any offer to the buyer of said renewed option shall provide the buyer with a new definite revised shipping date, but where

respondents lack a reasonable basis for providing a new definite revised shipping date, the notice shall inform the buyer that respondents are unable to make any representation regarding the length of the further delay.

(2) The offer of a renewed option shall expressly inform the buyer that, unless respondents receive, prior to the expiration of the old definite revised shipping date or any date superseding the old definite revised shipping date, notification from the buyer [81] specifically consenting to the further delay, the buyer will be deemed to have rejected any further delay, and to have cancelled the order if respondents are in fact unable to ship prior to the expiration of the old definite revised shipping date or any date superseding the old definite revised shipping date. *Provided, however,* that where respondents offer the buyer the option to consent to an indefinite delay the offer shall expressly inform the buyer that, should he so consent to an indefinite delay, he shall have a continuing right to cancel his order at any time after the old definite revised shipping date or any date superseding the old definite revised shipping date.

(3) Paragraph 5(B) shall not apply to any situation where respondents, pursuant to the provisions of paragraph 5(A)(4), have previously obtained consent from the buyer to an indefinite extension beyond the first revised shipping date. [82]

(C) Whenever a buyer has the right to exercise any option under this order or to cancel an order by so notifying respondents prior to shipment, failing to furnish the buyer with adequate means, at respondents' expense, to exercise such option or to notify respondents regarding cancellation. For the purpose of this order, "adequate means" requires respondents to:

(1) Provide any offer, notice or action required by this order in writing and by first class mail;

(2) Provide the buyer with the means in writing (by business reply mail or with postage prepaid by respondent) to exercise any option or to notify respondents regarding a decision to cancel.

Nothing in paragraph 5 of this order shall prevent respondents where they are unable to make shipment within the time set forth in paragraph 4(A) or within a delay period consented to by the buyer, from deciding to consider the order cancelled and providing the buyer with notice of said decision within a reasonable time after they become aware of said inability to ship, together with a prompt refund. [83]

6. Failing to deem an order cancelled and to make a prompt refund to the buyer whenever:

(A) Respondents receive, prior to the time of shipment, notification

from the buyer cancelling the order pursuant to any option, renewed option or continuing option under this order;

(B) Respondents have pursuant to paragraph 5(A)(3), provided the buyer with a definite revised shipping date which is more than thirty (30) days later than the applicable time set forth in paragraph 4 (A) or have notified the buyer that respondents are unable to make any representation regarding the length of the delay and respondents (1) have not shipped the merchandise within thirty (30) days of the applicable time set forth in paragraph 4(A), and (2) have not received the buyer's express consent to said shipping delay within said thirty (30) days.

(C) Respondents are unable to ship within the applicable time set forth in paragraph 5(B) and have not received, within the said applicable time, the buyer's consent to any further delay;

(D) Respondents have notified the buyer of their inability to make shipment and have indicated their decision not to ship the merchandise; or [84]

(E) Respondents fail to offer the option prescribed in paragraph 5(A) and have not shipped the merchandise within the applicable time set forth in paragraph 4(A).

For purposes of this order:

(1) "Shipment" shall mean the act by which the merchandise is physically placed in the possession of the carrier.

(2) "Receipt of a properly completed order" shall mean the time at which respondents receive an order from the buyer containing all the information requested by respondents and accompanied, where required, by the proper amount of money in the form of cash, check or money order. *Provided, however,* that where respondents receive notice that the check or money order tendered by the buyer has been dishonored or that the buyer does not qualify for a credit sale, "receipt of a properly completed order" shall mean the time at which (a) respondents receive notice that a check or money order for the proper amount tendered by the buyer has been honored, (b) the buyer tenders cash in the proper amount or (c) the seller receives notice that the buyer qualifies for a credit sale.

(3) "Refund" shall mean:

(a) Where the buyer tendered full payment for the unshipped merchandise in the form of cash, check or money order, a return of *the full amount* tendered in the form of cash, check, or money order;

(b) Where there is a credit sale:

(i) and the seller is a creditor, a copy of a credit memorandum of the like or an account statement reflecting the removal or absence of

any remaining charge incurred as a result of the sale from the buyer's account;

(ii) and a third party is the creditor, a copy of an appropriate credit memorandum or the like to the third party creditor which will remove the charge from the buyer's account or a statement from the seller acknowledging the cancellation of the order and representing that he has not taken any action regarding the order which will result in a charge to the buyer's account with the third party;

(iii) and the buyer tendered partial payment for the unshipped merchandise in the form of cash, check or money order, a return [86] of the amount tendered in the form of cash, check or money order.

(4) "Prompt refund" shall mean:

(a) Where a refund is made pursuant to definition (3)(a) or (3)(b)(iii) a refund sent to the buyer by first class mail within seven (7) working days of the date on which the buyer's right to a refund vests under the provisions of this order.

(5) The "time of solicitation" of an order shall mean that time when respondents have:

(a) Mailed or otherwise disseminated solicitation to a prospective purchaser;

(b) Made arrangements for an advertisement containing the solicitation to appear in a newspaper, magazine or the like or on radio or television which cannot be changed or cancelled without incurring substantial expense, or

(c) Made arrangements for the printing of a catalog, brochure or the like which cannot be changed without incurring substantial expense, in which the solicitation in question forms an insubstantial part.

7. Representing the safety, efficacy, performance, content or any other characteristic of any product unless [87] such claims are fully and completely substantiated by a reasonable basis which shall consist of competent objective material and such substantiative material is available to the public.

8. Misrepresenting that the nondelivery of merchandise ordered and paid for by a customer is caused by loss of the merchandise by the United States Postal Service.

9. Misrepresenting, directly or indirectly, the time or manner in which respondents' flame gun, or any other product used for the removal of snow or ice, will perform in the removal of snow or ice.

10. Failing to disclose, clearly and conspicuously, in all advertisements or other promotional material that the purchase price of respondents' flame gun or any other product does not include all components necessary for its operation and failing to identify the

component(s) which are not included in the purchase price, if such is the fact.

11. Misrepresenting, directly or indirectly, the time in which or the manner by which respondents' roach powder, or any other pesticide product, will kill or eliminate roaches.

12. Making any representation as to the safety of respondent's roach powder or any other pesticide [88] product without failing to disclose, clearly and conspicuously, in all advertisements or other promotional material for said products, the exact ingredients and percentage(s) of such ingredients contained therein.

13. Making any representation as to the safety of respondents' roach powder or other pesticide product without failing to clearly and conspicuously include the following statement in all advertisements and other promotional material for said products: "This product may be hazardous to your health and the environment. Read the label and use only as directed."

14. Misrepresenting, directly or indirectly, that respondents' TV antenna or any TV antenna will bring in sharp and clear reception and is superior to any other antenna.

15. Making any representation as to the life expectancy of flashlights or other similar battery operated product without failing to disclose, clearly and conspicuously in all advertisements and other promotional material for such products (a) the expected "on" life of the product; and (b) any limitations on the warranty of such product. [89]

16. Representing, directly or indirectly, that the Lincoln-Kennedy penny was minted by the United States Treasury Department.

17. Representing, directly or indirectly, that the Lincoln-Kennedy penny is a coin of historical and numismatic significance which is certain to grow in value.

18. Representing, directly or indirectly, in connection with the sale of any product that another product is given "free" or as a gift or without cost or charge in connection with:

a. any offer which runs for an indefinite term or continuously for a period in excess of one (1) year;

b. any offer not covered by (a) above, excluding introductory offers, unless as to such limited offer:

(1) a regular bona fide retail price is established for the product without the "free" product;

(2) a regular bona fide retail price is established for the "free" product, or in the absence of such price a determination is made of the cost to respondents of such other product; and [90]

c. the price of the product is reduced at least as much as the price or cost of the "free" product.

19. Failing to include the name "Jay Norris" or "Jay Norris Corporation" and an address and telephone number to which consumer complaints may be addressed in all correspondence relating to customer complaints.

20. Failing to maintain records of all orders, payments and shipments made by or received by respondents, including, but not limited to the following information:

a. Name and address of the customer;

b. Color, size, quantity, price, style number of merchandise ordered;

c. Date of receipt of the order;

d. The form of payment (check, cash, money order, credit sale);

e. Date and method of shipment of merchandise, including whether or not the shipment was insured and the amount of insurance, if any;

f. Date and form of refund, if any, and reason for such refund.

21. Failing to maintain records of all consumer complaints for a period of three years after such complaint is received, including, but not limited [91] to the following information:

a. Name and address of the consumer;
b. Date of receipt of the complaint;
c. Transaction about which complaint is received;
d. Nature of the complaint;
e. Date and disposition of the complaint.

II

It is further ordered, That Jay Norris Corp., and Pan-Am Car Distributors Corp., corporations, their successors and assigns, and Joel Jacobs, Mortimer Williams and Kenneth Mann, individually and as officers of said corporations, and respondents' officers, agents, representatives and employees directly or through any corporation, subsidiary, division, trade style, or other device, in connection with the advertising, offering for sale, sale and distribution of used automobiles by mail-order in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Failing to disclose, clearly and conspicuously in all advertisements, correspondence, or other promotional material for automobiles that:

(a) Interiors of motor vehicles have not been cleaned or recondi-

tioned by respondents prior to their being offered for sale, if such is the fact. [92]

(b) The used motor vehicles offered for sale by the respondents are ex-New York City taxicabs, if such is the fact.

2. Representing, directly or by implication, the ease or profit with which purchasers can resell respondents' automobiles.

3. Shipping, or causing to be shipped, any automobile which does not comply with all motor vehicle registration, safety and inspection standards of the state within which the automobile is being shipped or sold.

4. Misrepresenting the mechanical and physical condition of said automobiles;

5. Misrepresenting that said automobiles are in safe mechanical and operating condition;

6. Misrepresenting the extent to which said automobiles have been inspected and repaired in preparation for sale and delivery to customers; and

7. Misrepresenting that said automobiles are in sound condition and repair and will render normal, adequate and satisfactory service.

III

It is further ordered, That:

1. Respondents shall notify the Commission at least thirty (30) days prior to any proposed changes [93] in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other changes in the corporation which may affect compliance obligations arising out of the order.

2. The individual respondents named herein, shall promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment. Such notice shall include respondents' current business address and a statement as to the nature of the business or employment in which they are engaged as well as a description of their duties and responsibilities.

3. Respondents shall deliver a copy of this order to cease and desist to all personnel or agents of respondents responsible for the preparation, creation, production or publication of the advertising of all products covered by this order.

4. No provision of this order shall be construed in any way to annul, invalidate, repeal, terminate, modify or exempt respondents from complying [94] with agreements, orders or directives of any

kind obtained by any other agency or act as a defense to actions instituted by municipal or state regulatory agencies. No provision of this order shall be construed to imply that any past or future conduct of respondents complies with the rules and regulations of, or the statutes administered by the Federal Trade Commission.

IV

It is further ordered, That the allegations of the complaint are dismissed as to FEDERATED NATIONWIDE WHOLESALERS SERVICE, GARYDEAN CORP., t/a Nationwide Wholesalers Service, and P-N PUBLISHING COMPANY, INC.

OPINION OF THE COMMISSION

BY CLANTON, *Commissioner:*

This proceeding challenges the lawfulness of a variety of claims made in connection with the advertising of mail [2] order products. Respondents, since 1953, have advertised and sold through the mails a wide range of generally low-cost consumer products.[1] [3]

The complaint alleges, and the administrative law judge ("ALJ") found, that respondents, among other things, failed to live up to advertised promises of immediate delivery and prompt refunds and misrepresented the performance or characteristics of six specific products. In their appeal from the ALJ's initial decision, respondents not only attack the factual and legal bases of the proposed findings but also vigorously challenge the breadth and stringency of the recommended order.[2] Our consideration of these issues follows:

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[1] The respondents in this proceeding are Jay Norris, Inc.; Joel Jacobs and Mortimer Williams, who are the sole shareholders, officers and directors of Norris (ID 2); Pan Am, which was in the business of advertising and selling cars to consumers by mail (ID 5, 12); and Kenneth Mann, who together with Jacobs and Williams are the shareholders, officers and directors of Pan Am (ID 3). The ALJ dismissed the complaint as to Federated Nationwide Wholesalers Service, Garydean Corp., t/a Nationwide Wholesaler Service, and P-N Publishing Company, Inc. (ID p. 58). The term "respondents" hereinafter refers to the Jay Norris Corp., Joel Jacobs, and Mortimer Williams (and includes Pan Am and Kenneth Mann only as to ex-taxis). The following abbreviations are used in this opinion:

ID — Initial Decision, Finding No.
ID p. — Initial Decision, Page No.
CX — Complaint Counsel Exhibit No.
RX — Respondents' Exhibit No.
Tr. — Transcript of Testimony, Page No.
RAB — Respondents' Appeal Brief, Page No.
CAB — Complaint Counsel's Answering Brief, Page No.
RRB — Respondents' Reply Brief, Page No.
CPF — Complaint Counsel's Proposed Finding, Page No.
RPF — Respondents' Proposed Finding, Page No.
TROA — Transcript of Oral Argument, Page No.

[2] Respondents do not appeal from the ALJ's finding that the individual respondents Jacobs and Williams are properly held responsible for wrongdoing by the corporate respondent Jay Norris. Similarly, complaint counsel have not contested any of the allegations dismissed by the law judge.

Appendix B

I. *Immediate Delivery and Prompt Refund Claims*

The record quite clearly discloses that respondents made frequent statements in their catalogs and advertisements emphasizing the timeliness with which they effect delivery and issue refunds. These include representations such as "prompt delivery guaranteed," (CX 4) "immediate delivery guaranteed," (CX 8) or "to insure immediate delivery . . . please have check certified." (CX 409) For non-certified checks, respondents asked customers to "allow about 2 weeks until your check clears the bank." (*Id.*) Similar claims, of "prompt refund(s)" were made in connection with respondents' promises of money back guarantees for unsatisfied purchasers. (ID 17)

These and other representations were found to be deceptive by the law judge who noted, for example, that with respect to respondents' delivery claims they have "on numerous occasions deposited customers' checks or cashed money orders, and have not shipped the ordered merchandise for many months after receipt of the order and payment." (ID 24) The ALJ also found that many purchasers had encountered long delays in getting refunds and in some instances no refund was ever received. (ID 29, 32) [4]

Respondents do not deny making claims of "immediate delivery" or "prompt refunds," or even failing to fulfill such promises on occasion. Rather, they assert that the key issue is what consumers are reasonably entitled to expect in terms of the reliability of those promises. Every performance claim whether it be fuel economy in a car, durability in a toaster, or prompt service by a mail order company, expressly or impliedly represents how often that level of performance can be expected. Here, though their promises are unqualified, respondents nevertheless contend that the failure to make prompt deliveries and refunds 100 percent of the time does not necessarily compel the conclusion that their claims are false. Indeed, respondents argue that the magnitude of untimely deliveries and refunds—compared to their total sales—is relatively insignificant. To recharacterize this issue, when consumers read respondents' advertisements do they believe the statements implicitly represent, for example, that "all," "nearly all" or "most" purchasers would receive prompt delivery and refunds?

The record contains little direct evidence as to what degree of reliability the consuming public expected when it read these ads.[3] It

[3] In examining this issue, it is useful to note that a principal factor underlying promulgation of the Mail Order Merchandise TRR, 16 C.F.R. 435 (1975), was the frequent failure of mail order companies to deliver ordered goods within a reasonable time. As we noted there, the regulation of delivery procedures was called for in view of evidence "that substantial numbers of consumers are not getting mail order merchandise shipped within that time which consumers had been led to believe shipment would be made." 40 F. R. 51582, 51587 (1975). Much the same question is involved here.

Appendix B

is well established, however, that the Commission may determine the meaning of an ad without the aid of consumer testimony as to how the advertisement is perceived by the public. *E.g., Chrysler Corp.* v. *FTC*, 561 F.2d 357, 363 (D.C. Cir. 1977). Nor can it be doubted "that where an advertisement conveys more than one meaning, one of which is false, the advertiser is liable for the misleading variation. . . ." *National Commission on Egg Nutrition*, 88 F.T.C. 89, 186 (1976), *enforced in part*, 570 F.2d 157 (7th Cir. 1977), *petition for cert. filed*, 46 USLW 3694 (April 28, 1978). [5]

After examining respondents' ads in their overall context, we believe the evidence is clear that they represented that timely deliveries and refunds would be effected virtually without exception. Common sense suggests that a person reading an ad promising "immediate delivery" would be entitled to rely upon that claim with a fairly high degree of confidence that it would be fulfilled. Respondents' ads go even further. For example, their claims guaranteeing prompt delivery (CX 2, 4, 8) indicate to consumers that respondents take extraordinary precautions to insure speedy deliveries.[4] Similarly, respondents make unqualified claims of prompt refunds. (CX 386) Moreover, these refund claims are placed amidst claims of "your guarantee of satisfaction" (CX 57, 409), "no risk coupon" (CX 2, 4, 8) and "use . . . at our risk" (CX 96A–D, 886). Indeed, respondents' ads abound with claims that imply a purchaser cannot lose. We believe the rather unequivocal message conveyed by these ads is that respondents not only afforded their customers the opportunity to return any and all merchandise but also promised that such refunds would be made in a timely fashion in virtually every instance. Even if consumers might not expect absolute perfection, they could reasonably anticipate from reading respondents' ads that a far more reliable level of performance would be forthcoming than actually occurred. [6]

We find persuasive record support from which to conclude that respondents failed to make timely deliveries and refunds to numerous customers and that respondents' representations to the contrary were misleading and deceptive. The record is replete with

[4] Respondents argue that guaranteed should not be interpreted to represent greater reliability. Indeed, in another context they argue that "a money back guarantee carries with it a representation that the product might not effectively treat all cases" (RAB n. 37). In the case of deliveries this contention is clearly without merit. When delivery is late, respondents do not offer pecuniary compensation. The consumer is afforded no additional recourse. Given this context, if "guaranteed" is to have any meaning at all, it is that respondents' claim of prompt delivery is extremely reliable. *See* F.T.C. Guide Against Deceptive Advertising of Guarantees, 16 C.F.R. 239.7, *All State Industries of North Carolina, Inc.*, 75 F.T.C. 465, 488–89 (1969), *aff'd*, 423 F.2d 423 (4th Cir.), *cert. denied*, 400 U.S. 828 (1970).

testimony of consumers who experienced delivery or refund difficulties with respondents. (ID 18)[5] Abundant evidence also exists that many customers took the time to write their complaints to respondents, government agencies, consumer protection groups and magazines (ID pp. 9–15, 21–24).[6] These efforts are particularly noteworthy since most of the respondents' products are low price items for which many consumers are not likely to incur the trouble and expense of complaining. (CX 405–409) Thus, contrary to respondents' assertions, the testimony supplied by the 30 consumer witnesses, supplemented by the other evidence of consumer complaints, undoubtedly reflects the proverbial "tip of the iceberg."

Moreover, we agree with the ALJ that the procedures employed by respondents for recording, tracking, and responding to orders, complaints, and requests for refunds provide little solace to respondents in attempting to demonstrate the veracity of their claims. As the law judge observed: [7]

> . . . Respondents candidly admit that they cannot trace their shipments and accordingly cannot ascertain whether delivery of merchandise has been made. In response to complaints or inquiries about delivery they regularly make the assumption that the merchandise has been shipped and will be delivered soon. They do not check their records to see if shipment was actually made. They do not follow up to see if delivery was in fact subsequently accomplished. They assume that if nothing further is heard from the consumer, delivery was accomplished.
>
> With respect to refunds, respondents take the position that if they received the returned merchandise, a refund was made, and conversely, if they did not send a refund, they did not receive the returned merchandise. They apparently make no automatic refunds on complaints that merchandise was not delivered, but eventually make a reshipment or refund after subsequent complaints are received. (ID p. 61)

Notwithstanding these meager recordkeeping efforts and their demonstrated effect on delays in delivery and refunds, respondents contend that their performance relative to total sales is good.[7] The basis of this claim is respondents' colorfully described but rather simplistic "bucket method" of measuring complaints. Mr. Jacobs described this method when he explained how respondents calculated the ratio of complaints to sales: [8]

> A. I can tell you this. They [complaints] are going down percentage-wise because we measure by buckets. It's unusual. But our mail arrives and is kept in buckets. And we know that whereas years back we used to get "X" amount of buckets on a Monday and

[5] Although respondents question the probity of some of this testimony (RAB at 16–17), our review of the record convinces us of its reliability. (*See also* CAB at 11–13)

[6] As the ALJ correctly noted, this testimony by so-called "consumer experts" need not be discounted as being hearsay, since it was received not for the truth of the complaints, but rather to show that consumer dissatisfaction extended beyond the consumer witnesses who testified.

[7] Similarly, respondents claim their performance compared with competing mail order companies is good (RAB at 20–22, RPF at 22–25). These comparisons to the performance of other mail order companies are largely irrelevant. The issue here is whether respondents' practices render their claims of prompt performance deceptive. Consequently, we are concerned with what consumers expect and whether respondents met those expectations.

> "X" amount on any other given day, that with each succeeding year, the number of buckets coming in each year is less.
>
> As far as the amount is concerned, percentage-wise again, I would estimate that it probably is running now about 2% . . . of orders received. . . (Tr. 147)

This measuring rod is far too susceptible to error for us to place much confidence in these figures.[8] Clearly it does not indicate that respondents' failure to back up their claims was a rare occurrence. To the contrary, the evidence suggests that respondents had no basis for making the sweeping claims about delivery and refunds set forth in their advertisements.

Thus, in view of the record, respondents' representations of immediate delivery and prompt refunds were false and deceptive. [9]

II. *Miscellaneous Delivery and Refund Claims*

Respondents also made a variety of other delivery and refund claims in their advertising which the ALJ found to be deceptive. These ads represented that (1) the full purchase price, plus all additional charges, would be refunded to dissatisfied purchasers (ID 15, 16); (2) refunds would be made in negotiable currency (ID 15, 16); (3) nondelivery was frequently the fault in the Postal Service (ID 22); and (4) all shipments were insured against loss or damage (ID 15).[9] We agree with the ALJ's determinations concerning each of the first three claims but disagree as to the fourth.

Respondents boldly make claims of "no risk" and "full refund" but candidly concede that they normally did not return the full amount tendered in payment by consumers (RAB at 52). Though some consumers may not have expected to be reimbursed for postage and handling charges *(Id.)*, other consumers took a different view and demanded and received a refund for these additional charges (ID 27). In the face of express statements that purchasers incur "no risk," there is little doubt in our view that many, if not most, consumers would expect a full refund of the amount tendered. Similarly, in connection with the second claim, respondents also admit that for small amounts and under other circumstances they did not send the refund in a negotiable currency (ID 28). No such limitation can be read into respondents' advertising and in the absence of qualifying language we suspect that consumers would normally anticipate

[8] Apart from this testimony, nowhere in the record do we find systematic evidence of respondents' overall delivery and refund performance. Absent these more revealing measures, we are not left impotent. Even rougher measures of consumer dissatisfaction when coupled with our previous experience with consumer complaints reveal the significant failings that plagued respondents' operations.

[9] A separate allegation that respondents misrepresented the extent to which they would absorb part of the delivery costs was dismissed by the ALJ for lack of evidence. (ID p. 31)

payment of a promised refund to be in the form of cash or its equivalent. [10]

As for the third claim, respondents repeatedly represented that poor mail service was the cause of a delayed delivery or refund, rather than admitting that they were frequently to blame. (ID pp. 21, 22, 30) The prospect of losing customers to competitors is an important check on deceptive or just plain inefficient business practices. To avoid such competitive consequences, however, respondents attempt to mollify understandably upset customers by indiscriminately placing the blame on the U.S. Postal Service. Such efforts to hold onto consumers' business and induce repeat purchases are themselves deceptive.

Finally, we find respondents' claim that parcels shipped to purchasers are insured to be misleading. In reaching the same conclusion, the ALJ noted that:

> Respondents are self-insured; that is, instead of paying for public insurance on shipments, they make shipments at their own risk. Because they can not trace shipments, they make all necessary replacements at their own expense and at no charge to the customer (Jacobs 146–147; Williams 200). (ID 21)

Undoubtedly, most consumers would probably assume that reference to insurance means third-party insurance, and accord greater significance to the protective value of such insurance than to self-insurance. Nevertheless, respondents' use of the term "insurance" appears only in that part of their catalogs which sets out the additional charges for such items as handling and shipment. *See e.g.*, CX 407 p. 52. While technically deceptive, this brief mention of insurance at a point where most consumers would have already decided whether to purchase merchandise is not likely to have more than a *de minimis* effect. Given this situation and the limited frequency with which the reference appeared after Jay Norris stopped carrying insurance for its shipments, we see no need for an order provision addressing this issue. In any event, it is quite apparent that consumer dissatisfaction with respondents' delivery and refund practices stems from reliance upon overblown claims of timely service and full refunds rather than unfulfilled promises about insurance. [11]

III. *Performance Claims for Specific Products*

Apart from their more general mail order claims, the ALJ further determined that respondents deceptively advertised six specific products: (1) a propane flame gun, (2) a roach insecticide, (3) a

flashlight, (4) a collector's coin, (5) a television antenna, and (6) ex-taxicabs.[10]

A. *J-N Insta-Jet Propane Flame Gun* The complaint alleged and the ALJ found that respondents represented that "THE J-N INSTA-JET PROPANE FLAME GUN" is able to whip through the heaviest snow drifts and the thickest ice in seconds and is effective and efficient in clearing walks and driveways of ice and snow."[11] (ID 43)

The record contains ample evidence of the flame gun's inefficacy in removing ice. A representative of a private testing firm, Mr. John Lomash, testified as to the length of time required for a propane flame gun to melt one square foot patch of ice at 0° fahrenheit. He found that the flame gun required 6.5 minutes to melt a patch 1/8 inch thick and 11 minutes to melt a patch 1/4 inch thick (ID 43; Tr. 1249–53). Mr. Lomash conceded that at warmer temperatures the ice would melt more quickly. (Tr. 1249–50) Respondents contend that because the record fails to reveal the typical conditions confronting an ordinary user, the test results do not prove that the flame gun is ineffective. Such an argument is misplaced, however, since respondents do not qualify their performance claims to limited temperature conditions. Indeed, respondents' broad representations suggest that the consumer will meet with success even in the worst weather: [12]

> Fastest Way We Know To Clear Away Ice and Snow
>
> . . . clears away ice and snow faster than you'd believe possible: Whips through even the heaviest drifts. Clears walks and driveways. . . (CX 2, 4)

It is not difficult to imagine that many of the consumers attracted to this alleged time-saving snow-removal product would hail from the northern reaches of the country where they would be all too likely to encounter Mr. Lomash's "test conditions" in real life.

Moreover, the experience of the three consumers who testified about the propane flame gun is equally persuasive evidence of the gun's inability to melt snow and ice quickly. (ID 43) Respondents challenge the credibility of this testimony because these consumers were unable to assure respondents' counsel that the flame guns they used were in operable condition. The record suggests, however, that the guns did produce flames (Tr. 342–343, 603, 1494) and were apparently being used for the first time (Tr. 342, 603–604, 1493–1494).

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[10] The ALJ dismissed another allegation that respondents misrepresented an allegedly long-wearing sock (ID 45).

[11] Respondents object to the reference to "in seconds" in the complaint. It seems this phrase was used only in connection with a kerosene flame gun. (ID 43) Nevertheless, we believe the ALJ correctly concluded that respondents' advertisements conveyed the impression that their product would rapidly remove snow and ice. For example, respondents claim that the flame gun will "whip through even the heaviest drifts" of snow and is "the fastest way [they know of] to clear away ice and snow." (ID 43)

Further, we note that the assembly process involves only three parts (Tr. 603) and is relatively uncomplicated. (Tr. 613) More importantly, we reject respondents' supposed rule that would virtually eliminate the utility of consumer testimony except in the rare case where a consumer could assure with certainty that the product used was functioning properly. While the credibility of such testimony is always a relevant issue, there is nothing here to suggest that it should be discounted. Indeed, we find the similar experience of these three consumers strong evidence that respondents' performance claims greatly exaggerate the flame gun's ability to melt snow and ice quickly.[13] [13]

B. *Sure Kill Roach Powder* Respondents sell a product composed of equal parts boric acid and inert ingredients whose purpose is the elimination of the ubiquitous household pest — the cockroach. In their advertising respondents represented, *inter alia*, that their roach powder:

. . . is safe to use;
. . . gets rid of roaches once and for all;
. . . creates a deadly chain reaction which eliminates roaches and eggs;
. . . is guaranteed to prevent reinfestation for up to 5 years; and
. . . does not lose its capacity to kill under any conditions of use. (ID 44)

In addition to finding that these claims were not supportable, the law judge also concluded that respondents failed to disclose a material fact by not specifying in their advertising the chemical ingredients of the insecticide. Respondents, not surprisingly, disagree with these findings.

(1) Safety. No one disputes that boric acid, a main component of respondents' roach powder, is toxic to warm blooded animals if taken internally (Tr. 1351–1352). At the same time, complaint counsel's primary witness, Dr. Charles Mampe, acknowledged "that respondents' roach powder is relatively safe to use if applied according to instructions" (CX 2493C). Because respondents' roach powder is one-half boric acid, however, it is virtually no less lethal than the less concentrated but more toxic chlorinated hydrocarbon insecticides (*compare* Tr. 1391; CX 2493C with CX 2493D). Indeed, roughly four tablespoons of this roach powder could kill a grown man (Tr. 1353; CX 2493D). Given such hazards, it is clearly deceptive to make an unqualified representation of safety for this product. Respondents cannot simply advertise as "safe" this noxious insecticide and hope mail order consumers will read the label and use the product as directed. [14]

(2) Efficacy. The record, particularly Dr. Mampe's testimony,

[13] We also leave intact the ALJ's ruling, which respondents do not challenge, requiring disclosure that the flame gun does not come equipped initially with a propane cylinder.

amply supports the ALJ's findings that respondents misrepresented that this roach powder will kill roach eggs (Tr. 1366, 1380–1381) and will create a deadly chain reaction (Tr. 1356, 1424).[15] Respondents also claim their product will provide long-term, if not permanent, relief from cockroaches and will retain its effectiveness under varying conditions of use. While we are confident that few consumers would believe anything short of divine intervention could afford them eternal relief from this troublesome pest, respondents' ads are sufficiently specific (*e.g.*, Sure-Kill "never loses its killing power—even after years.") to impart a degree of believability to these claims that consumers might reasonably rely upon. A review of the testimony, including that given by the inventor and manufacturer of this product, Mr. Williams, thoroughly demonstrates the falsity of such claims. (Tr. 1357–1359; 1423) [15]

(3) Advertising Disclosure of Ingredients. Noting that boric acid is a well-known roach killer, the ALJ concluded that respondents' advertising should disclose the fact that their roach powder is 50 percent boric acid. We are not convinced, however, that this disclosure is of material benefit to consumers. The proposed disclosure, for example, provides consumers no basis for determining the importance of the other ingredients in respondents' product. Indeed, there is some suggestion that these inert ingredients significantly improve the effectiveness of the powder by making it more attractive to roaches. (RAB at 37) Complaint counsel counter by contending that respondents could inform consumers that these inert ingredients are significant. (TROA at 41) This argument misses the mark. If respondents' product significantly surpasses boric acid at killing roaches, it may be of little consequence to consumers that the powder is half boric acid.

Even if this information might be helpful to some consumers, that is not sufficient to render its nondisclosure deceptive. To the extent consumers have been misled by respondents' advertising into believing that the roach powder has special properties or capabilities, it is due to the exaggerated claims made in those ads. Requiring prior substantiation for future claims should serve as an adequate

[15] We are unimpressed with respondents' argument that a residue of the powder on roach eggs will kill the roaches when they hatch. (RAB at 36) The label directions instruct the consumer to place the powder in small trays (CX 3020, 4060) or to dust in cracks, crevices and building voids (CX 4186). The accumulation of powder on roach eggs could occur only if the dusting happened to reach eggs or if a contaminated roach returns to the nest and transfers sufficient quantities of the powder to eggs and other roaches to start a "chain reaction." Mr. Williams, inventor of this roach powder, testified that he has personally observed contaminated cockroaches return to the nest and transfer the insecticide to eggs and other roaches (Tr. 1424). He conceded, however, that the chain reaction does not always occur and is not the primary way of killing roaches (*Id.*). Moreover, Dr. Mampe seriously questioned whether the powder would be transferred to other roaches in sufficient amounts to kill them (Tr. 1393–1394). We find that respondents' claims both as to the destruction of eggs and the creation of a chain reaction are deceptive.

remedy to eliminate these misrepresentations. Without a stronger showing of materiality we see no justification for requiring disclosure of the ingredients in advertising. [16]

C. *Flashlight* In their advertising for this product, respondents refer to it as "The Five-Year Flashlight" and represent that it carries an "Absolute Five-Year Guarantee." (CX 46) In finding this advertising deceptive, the ALJ looked to the underlying manufacturer's guarantee which clearly states:

> Your light is also guaranteed to remain usable for a period of five years providing it has not been used for more than 10 hours. (CX 2044B)[14]

Neither this limitation nor the fact that the flashlight has an "on-life" of 10–20 hours were disclosed in respondents' advertisements. By not doing so, the ALJ determined that respondents failed to disclose material facts necessary to prevent the ads from being misleading. (ID 46) Respondents, while not disputing the terms of the guarantee, argue that the ads must be read in their total context. When the ads are so viewed, they contend, it is clear that the five-year claim refers to the storage capacity of the flashlight, not its on-time life.

There is no doubt that the ads emphasize the unique capability of the flashlight to retain its power over long periods of time. Nevertheless, we decline to graft, by implication, a normal use (*i.e.*, 10 hours) limitation onto an absolute guarantee claim, particularly where, as here, the ads make no mention of any condition on actual use. Indeed, the ads stress the fact that the flashlight works "when you need it." Even if few consumers would believe the light could stay on continuously for five years—an assumption that stretches credulity—they might well conclude that it should work under abnormal as well as normal patterns of usage. Consequently, we concur with the ALJ that, absent disclosure of the "on-life" conditions, respondents' claims for their flashlight had the capacity to mislead purchasers. [17]

D. *Lincoln Penny* Respondents also sell a collector's Lincoln penny bearing the likeness of former President Kennedy. The ALJ found that respondents misrepresented that:

> Their Lincoln-Kennedy penny was minted by the United States Treasury Department;
>
> Their Lincoln-Kennedy penny is a coin of historical and numismatic significance which is certain to grow in value;

[14] Based on evidence stipulated to at trial, normal usage of a flashlight is about two hours per year, or 10 hours over a five-year period. (ID 46)

> The issuance of their Lincoln-Kennedy penny was sanctioned by Section [331], Title 18 U.S. Code; and
>
> A free plaque containing historical coincidences between the lives of President Lincoln and President Kennedy is provided to purchasers with each coin. (ID 47)

On February 27, 1974, prior to issuance of the instant complaint, the United States Postal Service ruled that respondents had made misrepresentations similar to those set forth above in connection with the advertising of the Lincoln-Kennedy penny and issued an order limiting the postal services thereafter available to respondents. (ID 47)

Respondents have not sought to relitigate the substantive issues in this matter. Rather they urge on appeal that the allegations should be dismissed as not being in the public interest because the Postal Service decision adequately addresses the deception found in their advertising of the so-called "Lincoln-Kennedy" penny. Indeed, respondents argue that the challenged advertising was terminated even before the Postal Service issued its order. Abandonment of the practices, however, is no defense here. As complaint counsel point out, the present action involves claims made after as well as before issuance of the 1974 Postal Service order. (CAB at 35–36; CX 275, 405 at 11) A review of these later ads reveals that respondents have continued to misrepresent the source and value of the Lincoln-Kennedy penny. [18]

Furthermore, we reject respondents' contention that this case against the Lincoln-Kennedy penny lacks public interest. We note that the complaint issued in this case on September 3, 1975—well after the Postal Service issued its order against respondents. Recently, this Commission faced a similar contention that an already litigated case lacked public interest. *See Porter & Dietsch*, Dkt. 9047, slip op. at 32, 90 F.T.C. 770, (1977). There we noted that respondents' contention of a failure for want of public interest implicitly rests on "the wisdom of using limited public resources to correct particular law violations, a decision committed to the Commission's discretion." *Id.* Our response in that case applies with equal force here, "that bridge was crossed for the last time over two years ago when the Commission issued the complaint in this case." *Id.*

Finally, we concur with the ALJ's determination concerning respondents' offer of a "free" plaque (or resume) of historical coincidences.[15] The evidence indicates that over a period of years the

[15] There is no merit in respondents' contention that they lacked proper notice of this issue. Paragraphs 9-11 of the complaint clearly refer to the claims at stake here. There is also no foundation for respondents' assertion that litigation of this issue borders on harassment because it is inconsequential and could have been litigated in the

(Continued)

plaque and coins were never offered at a different price. (CX 62, 66, 69, 275)[14] By advertising a "free" plaque, Jay Norris presumably hoped to convince consumers that the package deal was a bargain, [19] *i.e.*, that the penny was competitively priced and for a limited time the plaque would be tossed in for no additional charge. The deceptive potential of a "free" offer which is not *bona fide* is well established. *See FTC* v. *Mary Carter Paint Co.*, 382 U.S. 46 (1965); *Kalwajtys* v. *FTC*, 237 F.2d 654 (7th Cir. 1956), *cert. denied*, 352 U.S. 1025 (1957). *See also F.T.C. Guide Concerning Use of Word "Free" and Similar Representations*, 16 C.F.R. 251 (1971). While the consumer injury here may not be great, we find the inclusion of such a representation in respondents' ads to be false and misleading, absent any evidence that the plaque was genuinely offered at no charge.

E. *Antenna* In connection with their advertisements for this product, respondents were found to have represented that: (1) the TV antenna will bring sharp and clear reception even in difficult areas; (2) the performance of the antenna is superior to any rabbit ear antenna or outdoor antenna; (3) the device will turn all types of house wiring into a TV antenna; and (4) their antenna is an electronic miracle (ID p. 45). Upon reviewing the evidence (CX 28, 886) we believe there can be little doubt that respondents' advertisements make these representations. For example, a typical ad (CX 886) includes the following assertions:

every home a super receiver,

one of the greatest TV antennas ever constructed,

a super receiver for black and white TV, FM, all kinds of difficult reception,

electronic miracle,

better than any set of rabbit ears, more efficient than complicated external antennas,

reception so sharp and clear it will amaze you even in more difficult areas.

[20] Though they did not contest having made such claims, respondents contend that the evidence adduced is insufficient to establish the falsity of these representations. Respondents again question the probative value of the consumer testimony elicited here, observing that these consumers are neither television nor antenna experts and, therefore, might not know when a television or antenna

earlier Postal Service action. Neither the circumstances of this case nor the decision in *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381 (1940), which respondents cite, provides any basis for such an argument.

[14] Since the two items apparently were never sold separately, the only issue is whether they were ever sold at a higher, or regular price.

installation was defective (RAB at 39–40). Yet, the consumers expressing dissatisfaction with the Jumbo Antenna had working television sets which operated well before and after the use of respondents' product (Tr. 334–335, 469). While it is possible these consumers improperly installed the Jumbo Antenna, this possibility appears remote. (Tr. 468–469)[17] In our view, this consumer testimony is persuasive evidence of the falsity of respondents' representations.[18]

Additionally, we find that witness Triolo's tests of respondents' product and other antennae provide convincing independent evidence that the expansive representations for the Jumbo TV Antenna are false. Mr. Triolo, who has thirty years' experience with technical antennae (Tr. 271), tested each of three types of antennae: an outdoor antenna, rabbit ears, and respondents' product (Tr. 273–274). At each of the two test sites, both the outdoor antenna and rabbit ears produced significantly better pictures than did the Jumbo TV Antenna (CX 2704). [21]

Respondents challenge Mr. Triolo's expertise, the reliability of his methods, and his impartiality. First, we find it irrelevant whether Mr. Triolo is a television expert. As we have already observed, even a layman can determine whether the TV picture is relatively the same before and after the installation of different antennae. Further, Mr. Triolo has the relevant expertise required in these tests: the ability to connect and disconnect the various antennae properly (Tr. 271).

Respondents also attempt at length to discredit Mr. Triolo's tests as unscientific or inconclusive for purposes of this proceeding. They fail. Respondents claim amazing performance even under the most difficult conditions; they also assert that their product is better than any set of rabbit ears and more efficient than complicated outdoor antennae. It is clear from an examination of the pictures taken in the course of the tests that respondents' product consistently produced substantially inferior television receptions compared to those produced by the other antennae. (CX 2704L–X) Respondents on the other hand have offered no substantial evidence to back up their claims.

Finally, respondents challenge Mr. Triolo's impartiality because he conducted the tests at the behest of Mrs. Mulhern, a Commission employee (Tr. 272–275), The record contains no evidence that would

[17] One of the witnesses was an experienced electronics design engineer. (Tr. 468–469) Moreover, respondents tout the ease of installation in their ads, advising consumers that "no special tools or additional material [is] required" and "you simply attach the adapter easily and quickly to your set. . . . (CX 886)

[18] Respondents place considerable reliance on the testimony of Mrs. Theodora Pierce who expressed satisfaction with respondents' antenna (RX 9A, B). While such testimony tends to prove that respondents' product in fact operates as an antenna, it does not rebut the experience of other consumers that the antenna fails to perform as claimed.

suggest that Mr. Triolo was anything but objective (*Id.*). Certainly the mere fact that the Commission staff has contracted for a study does not undermine the study's conclusions. Although Mr. Triolo's tests were limited in nature,[19] we believe they adequately demonstrate the falsity of respondents' broad claims.[20] [22]

F. *Ex-Taxis* For approximately five years from 1969 to 1974, respondent Pan Am engaged in the rather creative venture of selling through the mails used New York City taxicabs. Some 700–800 cars were sold during this period. As the ALJ found, respondent's advertising contained a host of misrepresentations concerning the mechanical and physical condition of these cars as well as their availability. In addition, the ALJ determined that the failure to disclose where the taxis came from and that the interiors of the cars were not reconditioned had the tendency and capacity to deceive prospective customers.[21] Respondents take issue only with the findings of non-disclosure.[22]

Undoubtedly, anyone who has had the scintillating experience of riding in a New York City taxicab — and presumably many who haven't but who have heard the tales related by others — will realize that these cars frequently do not receive the most delicate treatment. Nevertheless, we are reluctant to single New York out for special mention as the locale where these taxis saw service. While the trials and tribulations may be greater there, we suspect that conditions are not so different elsewhere that mere disclosure of the fact that the cars being offered for sale were once driven as taxis should suffice to alert would-be purchasers to the risks involved. Since respondent's ads disclosed that the used cars were ex-taxis, we decline to go further. [23]

Nor are we persuaded that this record adequately demonstrates the need for disclosing whether the car interiors have been cleaned or reconditioned. The ALJ did not find that respondent misrepresented the interior condition of the cars (ID pp. 56–57); neither do we. Although a mail order purchaser might reasonably expect that the

[19] Respondents also object to a number of other methodological factors (RAB at 42–43), but we believe they do not undercut the essential validity of the results.

[20] Respondents also urge that their use of the phrase "Electronic Miracle" is mere puffery. Although not insensitive to respondents' concern that the term "miracle" is commonly used in situations short of changing water into wine, we must conclude that the use of "electronic miracle" in the context of respondents' grossly exaggerated claims would lead consumers to give some added credence to the overall suggestion that this device is superior to other types of antennae.

[21] Finding insufficient record support, the ALJ dismissed allegations concerning claims relating to the appearance and price of the cars and the responsibility for effecting delivery. (ID p. 56) Similarly, the law judge dismissed allegations that respondents failed to disclose the meaning of "FOB" and "as is," whether the cars complied with any state motor vehicle inspection law, and whether the drivers hired to deliver cars to purchasers were independent contractors (ID p. 57).

[22] Respondents' other objection concerns paragraph I 3, which would require their automobiles to meet the various state inspection requirements and is considered in the discussion on relief.

car interiors were in presentable shape, it is also likely that most consumers would expect a used car, particularly a used taxi, to show signs of wear. Beyond that, the record is inadequate to establish that the interiors were generally in such poor condition that disclosure of that fact in respondent's advertising should be required.[23]

Moreover, aside from proscribing future misrepresentations, neither the notice order nor the order proposed by the law judge would require respondents to disclose the mechanical condition of their cars. The record reveals, however, that this attribute of the cars caused consumers the most trouble. We are reluctant to require the more intrusive remedy of affirmatively disclosing the condition of the car interior where the evidence of materiality is much less compelling. However, should respondents be induced to get into the used car business again, we believe the order provisions appropriately fence-in respondents with respect to misleading claims concerning a car's physical condition (both exterior and interior) as well as its mechanical condition. [24]

IV. *Unfair Business Practices*

The complaint alleged several additional unfair practices, including retention by respondents of monies for merchandise not shipped promptly, maintaining an unlisted telephone number and requiring proof of purchase and/or proof of return shipment in cases of nondelivery and demands for refunds.[24]

There is no dispute with the ALJ's determination that respondents committed an unfair practice in retaining customer payments while not fulfilling their end of the bargain by making prompt deliveries and refunds as promised. It is no less unfair for a firm to keep the benefits of unlawful acts than it is to have engaged in those acts in the first place. *See Koscot Interplanetary, Inc.*, 86 F.T.C. 1106, 1157, 1184–85 (1975); *Universal Credit Acceptance Corp.*, 82 F.T.C. 570, 647–54 (1973), *rev'd in part sub nom. Heater* v. *FTC* (refund provisions set aside), 503 F.2d 321 (9th Cir. 1974); *cf. Windsor Distributing Co.*, 77 F.T.C. 204, 222–23 (1969), *aff'd*, 437 F.2d 443 (3d Cir. 1971).

As for the unlisted telephone, the ALJ found that it was not unfair for respondents to close off this form of communication since other means were available. (ID p. 63) But once a customer complains about nondelivery or a failure to refund, the ALJ held it to be an

[23] What consumer testimony the record contains on this point sheds little light as to what consumers expected. One consumer, although disappointed, found the interior satisfactory (Tr. 1118-1119). Two others objected to the interior being dirty (Tr. 1102, 1138), but it is not clear whether this dirt would be easily removed. And another consumer objected to the fact that the dash was taped where the taxi equipment had been removed (Tr. 1178).

[24] A separate charge that respondents used numerous corporate names unfairly to create confusion in consumers' minds was dismissed by the law judge. (ID 41)

unfair practice for respondents not to provide the customer with a telephone number for future contacts. (ID p. 65)

We sympathize with the plight of consumers who have been frustrated in their attempts to obtain satisfaction from respondents. Similar problems were extensively documented during the Commission's consideration of the mail order rule. (*See* 40 F.R. 51582–86 (1975)) Nevertheless, we agree with the ALJ that many of the same difficulties encountered by purchasers in communicating with respondents by writing are likely to crop up in telephone contacts. (*See* ID p. 64) By correcting the central problem surrounding respondents' operations, namely their failure to perform as promised, many of the difficulties involved in [25] resolving complaints can be cleared up. That is the objective of our order as well as the mail order TRR (which also contains no telephone disclosure requirement). Moreover, for many customers of Jay Norris, telephone access would be of little value since the low price of many of the items purchased would not justify the cost of a long-distance call to the company's New York offices.

Thus, we concur in the law judge's refusal to require respondents to list their telephone number. For similar reasons, we decline to follow the ALJ's ruling concerning respondents' failure to disclose their phone number when responding to complaints.

The ALJ further concluded that in certain cases respondents unfairly required customers to submit proof of purchase before complaints were acted upon. This allegedly was necessitated by respondents' failure to keep better records. (ID p. 64) In reaching this decision the law judge rejected respondents' attempt to analogize their practice to the requirements customarily imposed by retail stores. He noted that

> a retail store which provides a sales slip and a face to face confrontation between the customer and the seller . . . is in a different situation than a mail-order business that sells merchandise unseen, prepaid, by mail. As long as respondents represent that the customer will get a refund or that delivery is guaranteed, they cannot require proof of payment, as a condition for their acting on a complaint, unless they disclose to the customer in the original contact that such proof will be required before reshipment or refund is made. (*Id.*)

However, the ALJ's finding of unfairness appears to be based on respondents' recordkeeping deficiencies, rather than the fact that they demanded proof of payment before making a refund or reshipment.

We agree with the law judge that customers ordering by mail should be able to expect that their orders could be satisfactorily processed by respondents in the ordinary course of business without

the need for further documentation. But the record here clearly does not support the charge that respondents systematically demanded proof of purchase before granting a refund or reshipping the ordered merchandise. To [26] be sure, respondents at one time used a form letter in responding to complaints which requested further information, such as the date of original order, the product ordered and the amount of the check. (CX 4245) Mr. Williams, vice-president and treasurer of Jay Norris, testified, however, that this form was employed only in those instances in which the customer didn't provide sufficient information for respondents to "check it back." (Tr. 196) Moreover, at some indeterminate time in the past respondents even stopped requesting this kind of information and simply shipped the customer duplicate merchandise where sufficient time had elapsed for delivery. (Tr. 196; CX 4248)

In view of this evidence we cannot sustain the law judge's finding that respondents' practices were unfair. Nor do we retain the recordkeeping provisions in paragraph 20 of the ALJ's order designed to remedy these alleged practices. To the extent better records are required, we believe the provisions of the mail order rule (which we incorporate in this order), together with the requirement for retention of complaint correspondence, satisfactorily address the shortcomings in respondents' recordkeeping procedures.

V. *Relief*

The order proposed by the ALJ differs in a number of respects from the original notice order. As discussed more fully below, we adopt with revisions the basic approach reflected in the law judge's recommended order.

A. *Delivery and Refund Practices* Both the notice order and the ALJ's proposed order rely primarily on provisions drawn from the Mail Order Merchandise TRR to remedy the violations uncovered in connection with respondents' delivery and refund practices.[25] Though the findings made in a specific case may justify harsher or milder remedies than those applied industrywide, we are persuaded that the law judge properly incorporated large portions of the mail order rule in his order. That is because many of the [27] problems encountered by consumers in this case are similar to those which led to issuance of the Rule and because we are challenging largely pre-TRR practices. Thus, in the absence of any particularly unique

[25] The corresponding provisions in the order we issue are Paragraphs 3–5 of Part I. Paragraph 1, as modified, addresses respondents' practice of not making prompt refunds for merchandise returned. Paragraph 2 remedies the failure to refund all monies including shipping costs.

conditions in this proceeding, we are reluctant to stray from the guidance provided by the Rule.

Indeed, in view of this situation, we believe it is appropriate to reinstate in our order the rebuttable presumptions contained in the TRR but deleted from paragraphs 4(c) and 5(c) of the order recommended by the ALJ. Under the Rule mail order sellers without documentary proof are presumed to lack a reasonable basis for their delivery claims. (16 C.F.R. 435.1(a)(4)) Similarly, sellers are presumed to have failed to provide buyers with an adequate opportunity to exercise their rights in the event of a delayed delivery by not providing written notification or the means to reply in writing. (*Id.* 435.1(b)(3)) However, the Commission permitted mail order firms to overcome these presumptions by demonstrating that equally effective means were used to meet the TRR's objectives.[26]

We see no compelling basis to depart from that scheme here. To be sure, respondents' meager recordkeeping contributed to our finding that they failed to live up to the performance claims in their advertising. Respondents clearly will have to limit their claims to the performance they can deliver. Moreover, it appears obvious that they will have to improve their procedures in order to conform with the requirements of this order and the Rule. For example, respondents will have to show that ordered merchandise is shipped routinely within the time promised (or if no time is specified within 30 days) and that procedures are in place which assure that purchasers are properly notified of shipping delays. Respondents' present inability to ascertain [28] when, or whether, shipment has been made following receipt of an order cannot continue.[27] Nevertheless, we are not disposed to foreclose alternative means of compliance so long as they satisfy the standards of conduct set forth in the order. In short, we believe reliance on the mail order rule as a basis for this part of the order provides a fair and effective means for dealing with the practices found unlawful in this proceeding.[28]

B. *Substantiation Requirements* Respondents challenge virtually every provision in the ALJ's proposed order, but nowhere is their opposition more vehement than that directed against order paragraph I 7 which prohibits them from:

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[26] As the Commission recognized in that proceeding, care must be taken not to unduly restrict the ability of companies attempting to deliver goods to consumers in the most cost-effective manner. [*See, e.g.*, 40 F.R. at 51588 (potential cost of recordkeeping), *Id.* at 51589 (flexible requirements on seller depending on number of delays), *Id.* at 51590 (30-day grace period to obtain buyer's consent).] We appreciate the fact that some improvements in the reliability of performance may exact too high a cost in reduced efficiency and higher prices.

[27] The only records kept were the (1) customers' names and addresses, (2) the date the order was received, (3) the amount of money remitted, and (4) for noncatalog orders, the product purchased. (ID 21) No records are kept showing shipment dates for specific orders.

[28] Another advantage of incorporating the mail order rule provisions in this order is that the explanations and interpretations associated with the Rule will facilitate compliance with the order.

Representing the safety, efficacy, performance, content, or any other characteristic of any product unless such claims are fully and completely substantiated by a reasonable basis which shall consist of competent objective material and substantiative material is available to the public. (ID pp. 86–87)

Respondents contend that paragraph I 7 infringes on their First Amendment rights, exceeds the Commission's statutory authority, and fails for lack of public interest. We consider each of these contentions in turn. [29]

It is beyond dispute that commercial speech is protected by the First Amendment. *See Bates* v. *Arizona*, 433 U.S. 350 (1977); *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); and *Bigelow* v. *Virginia*, 421 U.S. 809 (1975). It is equally clear, however, that commercial speech does not enjoy the same unfettered protection as political speech. In particular, deceptive or misleading commercial speech is properly subject to government regulation. For example, as the Court observed in *Virginia Pharmacy*,

> much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We see no obstacle to a State's dealing effectively with this problem. (*Id.* at 773; *see also, Bates*, 433 U.S. at 383–84)

More recently, in *Ohralick* v. *Ohio State Bar Association*, the Supreme Court explained why commercial speech is differentiable from other protected speech:

> To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of noncommercial expression. [46 USLW 4511, 4513–14 (1978)]

Respondents contend, though, that this order prohibits them from making representations for which they have no reasonable basis but which are nonetheless true. (RAB at 4–10) Complaint counsel counter by arguing that the order constitutes a reasonable deterrent to future deceptive advertising by proven violators of the FTC Act. (CAB at 7) [30]

In the first place, there is nothing novel about the substantiation provisions contained in this order. Similar requirements preventing sellers from disseminating advertisements without having a reason-

able basis for their claims have been included in numerous Commission orders.[29]

Moreover, while we are sensitive to Constitutional implications in fashioning a proper remedy for deceptive advertising, where the Commission merely orders violators to reasonably substantiate their performance claims, as it does here, such a requirement furthers rather than impairs First Amendment objectives. As the Seventh Circuit explained in *National Commission on Egg Nutrition, et al.*, 570 F.2d 157, 162 (7th Cir. 1977), *petition for cert. filed*, 46 USLW 3694 (April 28, 1978), the First Amendment interest in commercial speech also embraces the interests of the prospective audience – consumers. The consumers' interest in product information "is served by *insuring* that the information is not false or deceptive, and in fact, coincides with the public interest served by the regulation." (*ID.*) (emphasis added) The Supreme Court has also recognized the importance in insuring that commercial speech flows cleanly, commenting in *Bates* that

> the public and private benefits from commercial speech drive from confidence in its accuracy and reliability. Thus the leeway for untruthful or misleading expression that has been allowed in other contexts has little force in the commercial arena. (433 U.S. at 383–84)

Of course, concern for accuracy in commercial speech is not a new one for this Commission. In *Porter & Dietsch*, we recently considered how our statutory obligations to prohibit deceptive commercial speech mesh with the objectives of the First Amendment: [31]

> Deceptive commercial speech does not aid consumers in making their purchasing decisions and may cause economic injury to those consumers who purchase the advertised product because of the deception. It also reduces the effectiveness of all advertising by casting doubt on its reliability. Therefore, although sensitive to the public interest in the free flow of commercial speech, we serve the same public goals when we meet our statutory obligations by prohibiting deceptive advertising. (Slip op. at 5)

Similarly, in *Egg Nutrition*, we stated:

> Neither the objectives of the First Amendment, nor of the FTC Act are well-served, however, by commercial speech which is deceptive *** As Justice Stewart noted in concurring with the majority in *Virginia Pharmacy Board*, "*** the elimination of false and deceptive claims serves to *promote* the one facet of commercial price and product advertising that warrants First Amendment protection — its contribution to

[29] *See e.g. Porter & Dietsch*, slip op. at order paragraphs I. A and I. B. [90 F.T.C. 770]; *Fedders Corp.*, 85 F.T.C. 38, 69 (1975), *aff'd*, 529 F.2d 1398 (2d Cir. 1976), *cert. denied*, 429 U.S. 818 (1976); *National Dynamics Corp.*, 82 F.T.C. 488, 569 (1973), remanded for other reasons, 492 F.2d 1333 (2d Cir. 1974), *cert. denied*, 419 U.S. 993 (1974); *Firestone Tire & Rubber Co.*, 81 F.T.C. 398, 475 (1972), 481 F.2d 246 (6th Cir. 1973), *cert. denied*, 414 U.S. 1112 (1973).

> the flow of accurate and reliable information relevant to public and private decisionmaking." [425 U.S. at 781] (88 F.T.C. at 196) (emphasis added)

Respondents' argument appears to stem from the fear that the cost of acquiring a reasonable basis which they feel confident meets the order's requirements will chill their dissemination of truthful advertising claims. Yet, as the previously cited decisions emphasize, more reliable information enhances the flow of truthful advertising and furthers First Amendment interests. Since advertisers are in a far better position than consumers to verify the accuracy of their claims, it is only reasonable that they bear the burden of such verification.

Moreover, as the Commission has held on prior occasions, representations of objective product characteristics made without substantiation are, *for that reason*, deceptive, *National Dynamics Corp., et al.*, 82 F.T.C. 488, 559–60 (1973); *aff'd*, 492 F.2d 1333 (2d Cir.), *cert. denied*, 419 U.S. 993 (1974). Accordingly, when it forbids unsubstantiated performance claims by way of fencing in, the Commission is doing no more than proscribing a class of *deceptive* claims—indisputably permissible action under the First Amendment, *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n. 24 (1976). [32]

In *Egg Nutrition*, the Commission observed that

> Many consumers are likely to assume that when a product claim is advanced which is in theory subject to objective verification, the party making it possesses a reasonable basis for so doing, and that the assertion does not constitute mere surmise or wishful thinking on the advertiser's part. As a result, the rendition of a claim based upon inadequate or nonexistent substantiation violates Section 5 for failure to state a highly material fact, whose omission is deceptive. (88 F.T.C. at 191)

Although the complaint did not include such a charge, as respondents point out (RRB at 4), requiring them to have substantiation for their claims is clearly an appropriate remedial device for preventing recurrences of deceptive advertising.[30] [33]

As the Supreme Court has pointed out, the hardiness and objectivity of commercial speech make the prospects of its being

[30] We also note that it appears the Commission would be fully justified under the circumstances of this case in imposing upon respondents a broad requirement that they not *misrepresent* the safety or performance of any of the products they sell. For example, the Commission has entered, and courts have sustained, orders forbidding broad categories of misrepresentations with respect to the sale of "all products," *see American Aluminum Corporation, et al.*, 84 F.T.C. 21 (1974), *aff'd*, 522 F.2d 1278 (5th Cir. 1975); *All State Industries of North Carolina, Inc.*, 75 F.T.C. 465, 495 (1969), *aff'd*, 423 F.2d 423 (4th Cir.), *cert. denied*, 400 U.S. 828 (1970); *Mutual Construction Co., Inc., et al.*, 87 F.T.C. 621 (1976). We choose here not to enter an order prohibiting misrepresentations of various facets of all respondents' products; respondents will not be held to account for the absolute truth of their claims. Thus we impose a lesser remedy by requiring that respondents not make a safety or performance claim for any product without a reasonable basis. Rather respondents must simply substantiate these claims, and this will absolve them of civil penalty liability should any claim ultimately be proven false—clearly an unexceptionable approach under the First Amendment.

chilled by proper regulation unlikely. *Bates*, 433 U.S. at 383–84; *Virginia Pharmacy*, 425 U.S. n. 24 at 771–72[7] These attributes led the court in *Virginia Pharmacy* to indicate that earlier cases approving the reasonableness of regulatory prior restraints on commercial speech have continuing validity. *E.g., Donaldson* v. *Read Magazine*, 333 U.S. 178, 189–191 (1948); *FTC* v. *Standard Education Society*, 302 U.S. 112 (1937); *E. F. Drew & Co.* v. *FTC*, 235 F.2d 735, 739–740 (2d Cir. 1956), *cert. denied*, 352 U.S. 969 (1957).[31] And elsewhere the Supreme Court has noted as well established the Commission's power to restrain misleading statements in labels and advertisements. *See Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 69 n. 31 (1976).[32] *See also Ohralick*, 46 USLW at 4513–14.

Undoubtedly, many advertisers, irrespective of a substantiation requirement, would take steps to document their claims as a matter of good business practice or possibly out of fear of a subsequent false advertising challenge. To that extent, truthful advertising will not be chilled. Though substantiation increases the risk that some truthful, as well as false, claims may be challenged, it is a small price to pay to insure greater confidence in all [34] advertising. Whatever incremental reduction in advertising, attributable to a substantiation order, beyond that which would result if advertisers only disseminated nondeceptive claims "may well be necessary if the interest of consumers in truthful information is to be served at all." *Warner Lambert* v. *FTC*, supp. op. 1977–2 Trade Cases p. 61,646 at 72,653 (September 14, 1977), *cert. denied*, 46 USLW 3613 (April 4, 1978). *See also National Society of Professional Engineers* v. *U.S.*, 98 S. Ct. 1355, 1365–68 (1978).

Respondents also advance several additional arguments to the effect that paragraph I 7 of the ALJ's order exceeds the scope of the Commission's authority: (1) the coverage of all products and any advertisement is too broad, (2) the standard of "full," "complete" and "competent" substantiation is too vague, and (3) the requirement of making substantiative material generally available to the public is unwarranted.

Regarding the "all products – any advertisement coverage," respondents stress that the proposed order is overly broad and

[31] *Virginia Pharmacy* and *Bates* also leave intact other Commission cases holding that the government can restrict commercial speech to prevent deception to consumers, citing *Tashof* v. *FTC*, 437 F.2d 707 (D.C. Cir. 1970); *Murray Space Shoe Corp.* v. *FTC*, 304 F.2d 270 (2nd Cir. 1962); *American Medicinal Prods. Inc.* v. *FTC*, 136 F.2d 426 (9th Cir. 1943). In *Tashof*, the court upheld a Commission order prohibiting a retailer from advertising "discount prices without first conducting a "statistically significant survey" of competing stores to establish the accuracy of its claims. Even though the court conceded that advertised prices might otherwise be truthful, it found the requirement of a prior survey to be a reasonable deterrent to future violations. (*Id.* at 715)

[32] The Court relied on *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608 (1946); *FTC* v. *National Commission on Egg Nutrition*, 517 F.2d 485 (7th Cir. 1975); *E. F. Drew & Co.* v. *FTC*, 235 F.2d 735, 740 (2d Cir. 1956).

unduly burdensome. Respondents, however, have previously been subjected to orders of the Commission, the U.S. Postal Service and the New York State Attorney General for claims for three different products.[33] Moreover, in this case we have found that respondents misrepresented the performance of six products of widely varying cost and use. [35] The Commission has authority to fashion broad relief where necessary to deal effectively with wrongdoers. *See Firestone Tire & Rubber Co.*, 81 F.T.C. 398, 468 (1972), 481 F.2d 246 (6th Cir. 1973), *cert. denied*, 414 U.S. 1112 (1973) and cases cited therein.[34] The Commission's order must, or course, be tailored in some measure to the violations found. But where, as here, the violations involve a wide variety of products and a wide variety of deceptive claims an effective order must necessarily be very broad. That is particularly true in light of the history of prior proceedings undertaken to prevent deceptive claims by respondents. Precisely because they sell so many products, with no one category being substantially more important than any other, it seems likely that an order which did not apply to all products would do very little to protect the public. Rather than eliminating future deception, it would merely shift its locus to a different part of respondents' catalog.[35]

Although the order is broad, we note that respondents' troubles stemmed in large measure from making unqualified claims which, at least in the case of the flashlight and roach powder, overstated the manufacturers' claims for the products. By exercising a little more care in preparing their ads, respondents' compliance burdens under this order will be greatly reduced. Moreover, we have modified the substantiation provision in Part I of our order to limit its coverage to safety and performance claims, thereby [36] deleting reference to content or other product characteristics.[36] This change appropriately narrows the scope of the provision to those kinds of deceptive claims

[33] The order issued by the Commission in this matter will be the third imposed by the Commission upon these respondents within the past 15 years. The first order, a consent settlement, forbade various misrepresentations concerning the nutritional characteristics of vitamins and vitamin-mineral preparations, *Jay Norris Company Trading as Norris Nutritions, et al.*, 68 F.T.C. 702 (1965). The second order was entered after litigation and involved misrepresentations by respondents regarding their trade status and deceptive pricing, *Federated Nationwide Wholesalers, et al.* v. *Federal Trade Commission*, 398 F.2d 253 (2d Cir. 1968). *See also* U.S. Postal Service proceeding as referred to in ID 47; and Assurance of Discontinuance Pursuant to Executive Law Section 63, Subdivision 15, Attorney General of the State of New York Bureau of Consumer Frauds and Protection, dated June 30, 1976.

[34] *See also FTC* v. *Colgate Palmolive Co.*, 380 U.S. 374, 392 (1965); *Jacob Siegel Co.* v. *FTC*, 327 U.S. 608, 613 (1946); *Warner Lambert Co.* v. *FTC*, 562 F.2d 749, 762 (7th Cir. 1977), *cert. denied*, 46 USLW 3613 (April 4, 1978); *Niresk Industries, Inc.* v. *FTC*, 278 F.2d 337, 343 (7th Cir. 1960), *cert. denied*, 364 U.S. 883, cases which limit the Commission's discretion only by requiring that the remedy be reasonably related to the unlawful practice.

[35] No logical sub-grouping of respondents' products is suggested as a basis for limiting product coverage and there appears to be none. Respondents' products generally, like the ones involved in this case, vary tremendously in price and use. In any event, this record demonstrates that respondents' penchant for misrepresentation of performance is not confined to a narrow sub-group of products they sell.

[36] Performance claims clearly encompass representations as to efficacy.

which predominate in this case. Additionally, we have clarified the order to provide that substantiation must be available in written form. For example, that does not preclude respondents from relying, where appropriate, upon the technical advice of qualified persons for substantiation of product claims. It only means that such advice must be reduced to writing.

A separate substantiation provision has been inserted in Part II of the order to avoid any suggestion that the reference to "any product" in paragraph 6 of Part I does not include products covered by Part II. Part II coverage also has been expanded to include all used motor vehicles, rather than just automobiles, Given the variety and seriousness of the misrepresentations which occurred in connection with respondents' sale of used cars, it seems appropriate to fence in respondents as to future mail order sales of other types of vehicles, such as trucks, motorcycles, campers and the like.

Respondents further contend that the broad standards provided by the words "full," "complete" and "competent" are unduly vague and illegal as a matter of law. We note that similar language has been used in other substantiation orders. *See* n. 29, *supra.* These cases provide ample guidance to respondents in construing these terms, and more generally, the concept of reasonable basis. Moreover, we believe that the general meaning of these terms is readily understood.

Respondents next question the legal basis for requiring substantiation to be generally available to the public. We do not reach this question because we find there has been no showing that this is necessary to cure the violations found to exist. In this context it is sufficient that consumers are in a position to rely on the advertising claims without the trouble and expense of investigating the substantiation for themselves. *See Porter & Dietsch,* slip op. at 38. [37]

Finally, relying on *NLRB* v. *Wyman Gordon Co.,* 394 U.S. 759 (1969), respondents contend that prior substantiation requirements should be addressed in a rule forum. We recently rejected "this variation on the old theme of selective enforcement." *Porter & Dietsch,* slip op. at 32. We reject it again. We do not believe the public good would be well served if the Commission, in dealing with proven violators of Section 5, refrained from meeting out in administrative proceedings remedies appropriate to the violations found. Moreover, under 15 U.S.C. 45(m), the Commission is free to hold other concerns to the same standards we are imposing on these respondents, when the order we will enter becomes final.

Thus, having rejected respondents' challenges to the propriety of

requiring them to substantiate their claims, the final order will include such a provision.

C. *Other Provisions* After excising those order provisions for which corresponding violations were not found,[37] we adopt with some revisions the ALJ's order as it applies to the specific misrepresentations involving the six products.

In addition, we delete paragraph I 3 of the law judge's order which would prohibit respondents from shipping to any state any car which fails to meet the motor vehicle registration, safety and inspection standards of that state. The ALJ retained this provision in the order without explanation after dismissing the complaint charge that respondents failed to disclose a material fact by not revealing whether their cars were inspected for compliance with state law. [38] (ID p. 57) The record sheds little light on respondents' obligations under state inspection laws, the extent of their compliance with such laws, or whether state law is adequate to deal with the kind of distribution scheme engaged in by respondents. Thus, absent deception, we find little basis for imposing this requirement.[38]

We also believe paragraph I 13 of the proposed order is somewhat overbroad. Our determination that respondents deceptively advertised their roach powder as safe is based on the failure to qualify such claims by noting that the product could be used safely only in accordance with the instructions on the label. A more appropriate disclosure requirement is to require respondents to condition any claim of safety in ads for pesticides by including the following language: "To Use This Product Safely, You Must Follow The Instructions On The Label."

Lastly, we agree that the ALJ properly included Jay Norris, Jacobs, and Williams within the scope of Part II of the order.[39] The law judge's discussion of this issue is persuasive (ID p. 58). Jacobs and Williams were stockholders and corporate officers of Pan Am (*Id.;* Tr. 163). Though these individual respondents may not have taken an active role in the day to day business of Pan Am (Tr. 155, 167), they clearly were aware of its operations (Tr. 159, 167). *See Standard Educators, Inc.* v. *FTC,* 475 F.2d 401 (D.C. Cir. 1973), *cert. denied,* 414 U.S. 828 (1973). Furthermore, Pan Am's business was

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[37] Those provisions dropped include (1) disclosure of the roach powder ingredients, (2) disclosure of the interior condition of respondents' used cars, and (3) disclosure that the taxis were from New York.

[38] Respondents' ads do assert that "[e]ach car has been thoroughly serviced by our mechanics to put it in good operating condition and passes careful inspection before being released for delivery." *See, e.g.,* CX 51A. Although, as the ALJ noted (ID p. 57), it is not entirely clear what this "inspection" refers to, we are reluctant to construe it as meaning that respondents' cars conform to the inspection requirements of all 51 jurisdictions. Nor does the complaint allege such a claim. (*Cf.* complaint para. 9(21))

[39] With respect to Part II of the ALJ's order, respondents contend and the complaint counsel agree that the first word of paragraph 2 should be "misrepresenting" rather than "representing" (RAB at 50; CAB at 39). We have retained this provision in the final order as so modified.

conducted by Norris personnel at the Norris place of business (*Id.;* CX 752–754, 756). [39]

For reasons already articulated, the final order will not include provisions requiring respondents to disclose the Norris telephone number in response to complaints and imposing on them specific recordkeeping responsibilities. (*See* paragraphs I 19 and I 20 of the ALJ's order) We have kept in the final order, however, the provision obligating respondents to maintain records of consumer complaints, including the disposition of such complaints, for three years. This information is necessary to assist the Commission in ascertaining compliance with the order. To the same end, we have also inserted a requirement similar to that contained in other orders that respondents submit a detailed compliance report within 60 days and annually thereafter for five years.

Final Order

This matter having been heard by the Commission upon the appeal of respondents from the initial decision, and upon briefs and oral argument in support thereof and opposition thereto, and the Commission for the reasons stated in the accompanying Opinion having determined to sustain the initial decision with certain modifications: [2]

It is ordered, That the initial decision of the administrative law judge, pages 1–73, be adopted as the Findings of Fact and Conclusions of Law of the Commission, except to the extent modified or otherwise indicated in the accompanying Opinion.

Other Findings of Fact and Conclusions of Law of the Commission are contained in the accompanying Opinion.

It is further ordered, That the following order to cease and desist be, and it hereby is, entered:

Order

I

It is ordered, That Jay Norris Corp., a corporation, its successors and assigns, and Joel Jacobs and Mortimer Williams individually and as officers of said corporation, and respondents' officers, agents, representatives and employees directly or through any corporation, subsidiary, division, trade style, or other device, in connection with the advertising, offering for sale, sale and distribution of general mail-order merchandise in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Failing to refund the amount required by Paragraph 2, in connection with the return of merchandise purchased from respondents, within the time specified in respondents' advertisements. If no time is specified, such refund must be made within the time specified in Paragraph 5(E)(4) of this Part. [3]

2. Failing to refund the full purchase price of merchandise including postage, insurance, handling, shipping, or any other fee or charge paid by the purchaser any time a refund is made to such purchaser, unless respondents clearly state in their advertisement the exact nature of the refund including any items of the purchaser's expense that will not be refunded.

3. (A) Soliciting any order for the sale of merchandise to be ordered by the buyer through the mails unless, at the time of the solicitation, respondents have a reasonable basis to expect that they will be able to ship any ordered merchandise to the buyer: (1) within the time clearly and conspicuously stated in any such solicitation, or (2) if no time is clearly and conspicuously stated, within thirty (30) days after receipt of a properly completed order from the buyer; and

(B) Providing any buyer with any revised shipping date, as provided in Paragraph 4 of this Part unless, at the time any such revised shipping date is provided, respondents have a reasonable basis for making such representation regarding a definite revised shipping date; or

(C) Informing any buyer that they are unable to make any representation regarding the length of any delay unless (1) respondents have a reasonable basis for so informing the buyer and (2) respondents inform the buyer of the reason or reasons for the delay.

For purposes of this order, the failure of respondents to have records or other documentary proof establishing their use of systems and procedures which assure the shipment of merchandise in the ordinary course of business within any applicable time set forth in this order will create a rebuttable presumption that the respondents lacked a reasonable basis for any expectation of shipment within said applicable time. [4]

4. (A) Where respondents are unable to ship merchandise within the applicable time set forth in Paragraph 3(A) above, failing to offer to the buyer, clearly and conspicuously and without prior demand, an option either to consent to a delay in shipping or to cancel his order and receive a prompt refund. Said offer shall be made within a reasonable time after respondents first become aware of their inability to ship within the applicable time set forth in Paragraph 3(A), but in no event later than said applicable time.

(1) Any offer to the buyer of such an option shall fully inform the

buyer regarding his right to cancel the order and to obtain a prompt refund and shall provide a definite revised shipping date, but where respondents lack a reasonable basis for providing a definite revised shipping date the notice shall inform the buyer that respondents are unable to make any representation regarding the length of the delay.

(2) Where respondents have provided a definite revised shipping date which is thirty (30) days or less later than the applicable time set forth in Paragraph 3(A), the offer of said option shall expressly inform the buyer that, unless respondents receive, prior to shipment and prior to expiration of the definite revised shipping date, a response from the buyer rejecting the delay and cancelling the order, the buyer will be deemed to have consented to a delayed shipment on or before the definite revised shipping date.

(3) Where the respondents have provided a definite revised shipping date which is more than thirty (30) days later than the applicable time set forth in Paragraph 3(A), or where the respondents are unable to provide a definite revised shipping date and therefore inform the buyer that they are unable to make any representation regarding the length of the [5] delay, the offer of said option shall also expressly inform the buyer that his order will automatically be deemed to have been cancelled unless (a) respondents have shipped the merchandise within thirty (30) days of the applicable time set forth in Paragraph 3(A) above, and have received no cancellation prior to such shipment, or (b) respondents have received from the buyer within thirty (30) days of said applicable time, a response specifically consenting to said shipping delay. Where the respondents inform the buyer that they are unable to make any representation regarding the length of the delay, the buyer shall be expressly informed that, should he consent to an indefinite delay, he will have a continuing right to cancel his order at any time after the applicable time set forth in Paragraph 3(A) by so notifying respondents prior to actual shipment.

(4) Nothing in this paragraph shall prohibit respondents when they furnish a definite revised shipping date to Paragraph 4(A)(1) above, from requesting, simultaneously with or at any time subsequent to the offer of an option pursuant to Paragraph 4(A), the buyer's express consent to a further unanticipated delay beyond the definite revised shipping date. *Provided, however,* that where respondents solicit consent to an unanticipated indefinite delay the solicitation shall expressly inform the buyer that, should he so consent to an indefinite delay, he shall have a continuing right to cancel his order at any time after the definite revised shipping date by so notifying respondents prior to actual shipment.

(B) Where respondents are unable to ship merchandise on or before the definite revised shipping date provided under Paragraph 4(A)(1), and consented to by the buyer pursuant to Paragraphs 4(A)(2) and 4(A)(3), failing to offer to the buyer, clearly and conspicuously and without prior demand, a renewed option either to consent to a further [6] delay or to cancel the order and to receive a prompt refund. Said offer shall be made within a reasonable time after respondents first become aware of their inability to ship before the said definite revised date, but in no event later than the expiration of the definite revised shipping date. *Provided, however,* that where respondents previously have obtained the buyer's express consent to an unanticipated delay until a specific 4(A)(4) definite shipping date, pursuant to Paragraph 4 (A) (4) or to a further delay until a specific date beyond the definite revised shipping date pursuant to Paragraph 4(B), that date to which the buyer has expressly consented shall supersede the definite revised shipping date for purposes of Paragraph 4(B).

(1) Any offer to the buyer of said renewed option shall provide the buyer with a new definite revised shipping date, but where respondents lack a reasonable basis for providing a new definite revised shipping date, the notice shall inform the buyer that respondents are unable to make any representation regarding the length of the further delay.

(2) The offer of a renewed option shall expressly inform the buyer that, unless respondents receive, prior to the expiration of the old definite revised shipping date or any date superseding the old definite revised shipping date, notification from the buyer specifically consenting to the further delay, the buyer will be deemed to have rejected any further delay, and to have cancelled the order if respondents are in fact unable to ship prior to the expiration of the old definite revised shipping date or any date superseding the old definite revised shipping date. *Provided, however,* that where respondents offer the buyer the option to consent to an indefinite delay the offer shall expressly inform the buyer that, should he so consent to an indefinite delay, he shall have a continuing right to cancel his order at any time after the old definite revised shipping date or any date superseding the old definite revised shipping date. [7]

(3) Paragraph 4(B) shall not apply to any situation where respondents, pursuant to the provisions of Paragraph 4(A)(4), have previously obtained consent from the buyer to an indefinite extension beyond the first revised shipping date.

(C) Whenever a buyer has the right to exercise any option under

this order or to cancel an order by so notifying respondents prior to shipment, failing to furnish the buyer with adequate means, at respondents' expense, to exercise such option or to notify respondents regarding cancellation. For the purposes of this order, the failure of respondents:

(1) To provide any offer, notice or action required by this order in writing and by first class mail will create a rebuttable presumption that the respondents failed to offer a clear and conspicuous offer, notice or option;

(2) To provide the buyer with the means in writing (by business reply mail or with postage prepaid by respondents) to exercise any option or to notify respondents regarding a decision to cancel, will create a rebuttable presumption that the respondents did not provide the buyer with adequate means pursuant to this Paragraph 4(C).

Nothing in Paragraph 4 of this Part shall prevent respondents where they are unable to make shipment within the time set forth in Paragraph 3(A) or within a delay period consented to by the buyer, from deciding to consider the order cancelled and providing the buyer with notice of said decision within a reasonable time after they become aware of said inability to ship, together with a prompt refund.

5. Failing to deem an order cancelled and to make a prompt refund to the buyer whenever:

(A) Respondents receive, prior to the time of shipment, notification from the buyer cancelling the order pursuant to any option, renewed option or continuing option under this order; [8]

(B) Respondents have pursuant to Paragraph 4(A)(3), provided the buyer with a definite revised shipping date which is more than thirty (30) days later than the applicable time set forth in Paragraph 3(A) or have notified the buyer that respondents are unable to make any representation regarding the length of the delay and respondents (1) have not shipped the merchandise within thirty (30) days of the applicable time set forth in Paragraph 3(A), and (2) have not received the buyer's express consent to said shipping delay within said thirty (30) days;

(C) Respondents are unable to ship within the applicable time set forth in Paragraph 4(B) and have not received, within the said applicable time, the buyer's consent to any further delay;

(D) Respondents have notified the buyer of their inability to make shipment and have indicated their decision not to ship the merchandise; or

(E) Respondents fail to offer the option prescribed in Paragraph

4(A) and have not shipped the merchandise within the applicable time set forth in Paragraph 3(A).

For purposes of this Part:

(1) "Shipment" shall mean the act by which the merchandise is physically placed in the possession of the carrier.

(2) "Receipt of a properly completed order" shall mean the time at which respondents receive an order from the buyer containing all the information requested by respondents and accompanied, where required, by the proper amount of money in the form of cash, check or money order. *Provided, however,* that where respondents receive notice that the check or money order tendered by the buyer has been dishonored or that the buyer does not qualify for a credit sale, "receipt of a properly completed order" shall mean the time at which (a) respondents receive notice that a check or money order for the proper amount tendered by the buyer has been honored, (b) the buyer tenders cash in the proper amount or (c) the seller receives notice that the buyer qualifies for a credit sale. [9]

(3) "Refund" shall mean:

(a) Where the buyer tendered full payment for the unshipped merchandise in the form of cash, check or money order, a return of the full amount tendered in the form of cash, check, or money order;

(b) Where there is a credit sale:

(i) and the seller is a creditor, a copy of a credit memorandum or the like or an account statement reflecting the removal or absence of any remaining charge incurred as a result of the sale from the buyer's account;

(ii) and a third party is the creditor, a copy of an appropriate credit memorandum or the like to the third party creditor which will remove the charge from the buyer's account or a statement from the seller acknowledging the cancellation of the order and representing that he has not taken any action regarding the order which will result in a charge to the buyer's account with the third party;

(iii) and the buyer tendered partial payment for the unshipped merchandise in the form of cash, check or money order, a return of the amount tendered in the form of cash, check or money order.

(4) "Prompt refund" shall mean:

(a) Where a refund is made pursuant to definition (3)(a) or (3)(b)(iii) a refund sent to the buyer by first class mail within seven (7) working days of the date on which the buyer's right to a refund vests under the provisions of this order.

(5) The "time of solicitation" of an order shall mean that time when respondents have:

(a) Mailed or otherwise disseminated solicitation to a prospective purchaser; [10]

(b) Made arrangements for an advertisement containing the solicitation to appear in a newspaper, magazine or the like or on radio or television which cannot be changed or cancelled without incurring substantial expense; or

(c) Made arrangements for the printing of a catalog, brochure or the like which cannot be changed without incurring substantial expense, in which the solicitation in question forms an insubstantial part.

6. Representing the safety or performance of any product unless such claims are fully and completely substantiated by a reasonable basis which shall consist of competent and objective material available in written form.

7. Misrepresenting that the nondelivery of merchandise ordered and paid for by a customer is caused by loss of the merchandise by the United States Postal Service.

8. Misrepresenting, directly or indirectly, the time or manner in which respondents' flame gun, or any other product used for the removal of snow or ice, will perform in the removal of snow or ice.

9. Misrepresenting, directly or indirectly, the time in which or the manner by which respondents' roach powder, or any other pesticide product, will kill or eliminate roaches.

10. Making any representation as to the safety of respondents' roach powder or other pesticide product without failing to clearly and conspicuously include the following statement in all advertisements and other promotional material for said products: "To use this product safely, you must follow the instructions on the label."

11. Misrepresenting, directly or indirectly, that respondents' TV antenna or any TV antennna will bring in sharp and clear reception and is superior to any other antenna. [11]

12. Making any representation as to the life expectancy of flashlights or other battery operated product without failing to disclose, clearly and conspicuously in all advertisements and other promotional material for such products (a) the expected "on" life of the product; and (b) any limitations on the warranty of such product.

13. Representing, directly or indirectly, that the Lincoln-Kennedy penny was minted by the United States Treasury Department.

14. Representing, directly or indirectly, that the Lincoln-Kennedy penny is a coin of historical and numismatic significance which is likely to increase in value.

15. Representing, directly or indirectly, in connection with the

sale of any product that another product is given "free" or as a gift without cost or charge in connection with:

a. any offer which runs for an indefinite term or continuously for a period in excess of one (1) year; or

b. any offer not covered by (a) above, excluding introductory offers, unless as to such limited offer:

(1) a regular bona fide retail price is established for the product without the "free" product;

(2) a regular bona fide retail price is established for the "free" product, or in the absence of such price a determination is made of the cost to respondents of such other product; and

(3) the price of the product is reduced at least as much as the price or cost of the "free" product. [12]

II

It is further ordered, That Jay Norris Corp., and Pan-Am Car Distributors Corp., corporations, their successors and assigns, and Joel Jacobs, Mortimer Williams and Kenneth Mann, individually and as officers of said corporations, and respondents' officers, agents, representatives and employees directly or through any corporation, subsidiary, division, trade style, or other device, in connection with the advertising, offering for sale, sale and distribution of used motor vehicles by mail-order in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, do forthwith cease and desist from:

1. Misrepresenting, directly or by implication, the ease or profit with which purchasers can resell respondents' motor vehicles;

2. Misrepresentating the mechanical and physical condition of said motor vehicles;

3. Misrepresenting that said motor vehicles are in safe mechanical and operating condition;

4. Misrepresenting the extent to which said motor vehicles have been inspected and repaired in preparation for sale and delivery to customers;

5. Misrepresenting that said motor vehicles are in sound condition and repair and will render normal, adequate and satisfactory service; and

6. Representing the safety or performance of said motor vehicles unless such claims are fully and completely substantiated by a reasonable basis which shall consist of competent and objective material available in written form.

Appendix B

III

It is further ordered, That:

1. Respondents shall maintain records of all consumer complaints for a period of three years after such complaint is received, including, but not limited to the following information: [13]

a. Name and address of the consumer;
b. Date of receipt of the complaint;
c. Transaction about which complaint is received;
d. Nature of the complaint; and
e. Date and disposition of the complaint.

2. Respondents shall notify the Commission at least thirty (30) days prior to any proposed changes in the corporate respondents such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries or any other changes in the corporation which may affect compliance obligations arising out of the order.

3. The individual respondents named herein, shall promptly notify the Commission of the discontinuance of their present business or employment and of their affiliation with a new business or employment. Such notice shall include respondents' current business address and a statement as to the nature of the business or employment in which they are engaged as well as a description of their duties and responsibilities.

4. Respondents shall deliver a copy of this order to cease and desist to all personnel or agents of respondents responsible for the preparation, creation, production or publication of the advertising of all products covered by this order.

5. No provision of this order shall be construed in any way to annul, invalidate, repeal, terminate, modify or exempt respondents from complying with agreements, orders or directives of any kind obtained by any other agency or act as a defense to actions instituted by municipal or state regulatory agencies. No provision of this order shall be construed to imply that any past or future conduct of respondents complies with the rules and regulations of, or the statutes administered by the Federal Trade Commission. [14]

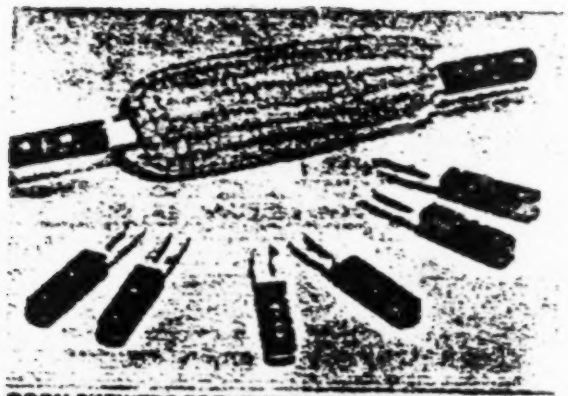
6. Respondents herein shall, within sixty (60) days after service of this order, and annually for five (5) years thereafter, file with the Commission a written report setting forth in detail the manner and form of their compliance with this order. The expiration of the obligation to file such reports shall not affect any other obligation arising under this order.

Appendix B

IV

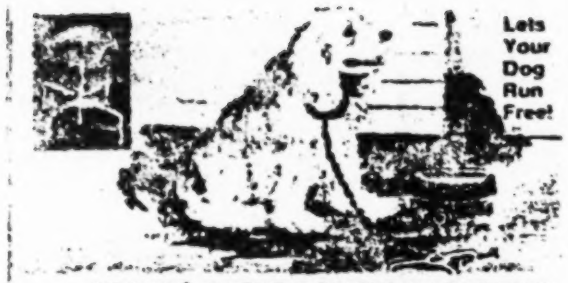
It is further ordered, That the allegations of the complaint are dismissed as to FEDERATED NATIONWIDE WHOLESALERS SERVICE, GARYDEAN CORP., t/a Nationwide Wholesalers Service, and P-N PUBLISHING COMPANY, INC.

APPENDIX C — ADVERTISEMENTS SUBMITTED TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT



CORN SKEWERS PREVENT BURNT FINGERS No more burned, buttery fingertips. These corn skewers are a great looking way to eat corn easily. Made of stainless steel with handsome rosewood handles. Terrific for kitchen, barbecue. Use as hors d'oeuvre forks or for serving fruit sections as well. Set of 8.
#846 Corn Skewers ..... $2.99, 2 sets/$5.50

Appendix C



NOW WALK YOUR DOG FROM YOUR EASY CHAIR! Now tie your dog for as long as you like, without a worry about tangling! New leash holder swivels 360°, prevents leash from tangling around pole. Easily planted.
#1359 Leash Holder ..... $3.99, 2/$6.99

AUTOMATIC DOOR-SHUT KEEPS COOL AIR IN, HEAT OUT! Closes doors gently, firmly, automatically. Keeps out flies & noise, saves fuel bills! Fits any door with standard pin hinge. Adjustable for heavy or light doors. Won't slam!
#1323 Automatic Door-Shut .... $4.99, 2/$8.99

APPENDIX D — THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX D — THE FEDERAL TRADE COMMISSION ACT, 15 U.S.C. §45

§ 45. Unfair methods of competition unlawful; prevention by Commission—Declaration of unlawfulness; power to prohibit unfair practices

(a)(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

(2) The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 406(b) of said Act, from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

Proceeding by Commission; modifying and setting aside orders

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41 to 46 and 47 to 58 of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as

to require such action or if the public interest shall so require: *Provided, however,* That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

Review of order; rehearing

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such

additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 347 of Title 28.

Jurisdiction of court

(d) Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

Precedence of proceedings; exemption from liability

(e) Such proceedings in the court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the Commission or judgment of court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts.

Service of complaints, orders and other processes; return

(f) Complaints, orders, and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the residence or the principal office or place of business of such person, partnership, or corporation; or (c) by mailing a copy thereof by registered mail or by certified mail addressed to such person, partnership, or corporation at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process mailed by registered mail or by certified mail as aforesaid shall be proof of the service of the same.

Finality of order

(g) An order of the Commission to cease and desist shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b); or

(2) Upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been af-

firmed, or the petition for review dismissed by the court of appeals, and no petition for certiorari has been duly filed; or

(3) Upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review dismissed by the court of appeals; or

(4) Upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Commission be affirmed or the petition for review dismissed.

Same; order modified or set aside by Supreme Court

(h) If the Supreme Court directs that the order of the Commission be modified or set aside, the order of the Commission rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the Commission shall become final when so corrected.

Same; order modified or set aside by Court of Appeals

(i) If the order of the Commission is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected.

Same; rehearing upon order or remand

(j) If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the Commission for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered upon such rehearing shall become final in the same manner as though no prior order of the Commission had been rendered.

Definition of mandate

(k) As used in this section the term "mandate", in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

* * *

Penalty for violation of order; injunctions and other appropriate equitable relief

(*l*) Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.

Civil actions for recovery of penalties for knowing violations of rules and cease and desist orders respecting unfair or deceptive acts or practices; jurisdiction; maximum amount of penalties; continuing violations; de novo determinations; compromise or settlement procedure

(m)(1)(A) The Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person, partnership, or corporation which violates any rule under this chapter respecting unfair or deceptive acts or practices (other than an interpretive rule or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of subsection (a)(1) of this section) with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule. In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

(B) If the Commission determines in a proceeding under subsection (b) of this section that any act or practice is unfair or deceptive, and issues a final cease and desist order with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice—

(1) after such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and

(2) with actual knowledge that such act or practice is unfair or deceptive and is unlawful under subsection (a)(1) of this section.

In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

Appendix D

(C) In the case of a violation through continuing failure to comply with a rule or with subsection (a)(1) of this section, each day of continuance of such failure shall be treated as a separate violation, for purposes of subparagraphs (A) and (B). In determining the amount of such a civil penalty, the court shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(2) If the cease and desist order establishing that the act or practice is unfair or deceptive was not issued against the defendant in a civil penalty action under paragraph (1)(B) the issues of fact in such action against such defendant shall be tried de novo.

(3) The Commission may compromise or settle any action for a civil penalty if such compromise or settlement is accompanied by a public statement of its reasons and is approved by the court.

As amended Nov. 16, 1973, Pub.L. 93–153, Title IV, § 408(c), (d), 87 Stat. 591, 592; Jan. 4, 1975, Pub.L. 93–637, Title II, §§ 201(a), 204(b), 205(a), 88 Stat. 2193, 2200; Dec. 12, 1975, Pub.L. 94–145, § 3, 89 Stat. 801.

* * *

APPENDIX D — THE FEDERAL TRADE COMMISSION ACT, 15 U.S.C. §53(a)

§ 53. Same; temporary injunction—Power of Commission; jurisdiction of courts

(a) Whenever the Commission has reason to believe—

(1) that any person, partnership, or corporation is engaged in, or is about to engage in, the dissemination or the causing of the dissemination of any advertisement in violation of section 52 of this title, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission under section 45 of this title, and until such complaint is dismissed by the Commission or set aside by the court on review, or the order of the Commission to cease and desist made thereon has become final within the meaning of section 45 of this title, would be to the interest of the public,

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States or in the United States court of any Territory, to enjoin the dissemination or the causing of the dissemination of such advertisement. Upon proper showing a temporary injunction or restraining order shall be granted without bond. Any such suit shall be brought in the district in which such person, partnership, or corporation resides or transacts business.

* * *

No. 79-434

In the Supreme Court of the United States

OCTOBER TERM, 1979

JAY NORRIS, INC., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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INDEX

CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-434

JAY NORRIS, INC., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

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OPINIONS BELOW

The opinion (Pet. App. 1a-19a) of the court of appeals is reported at 598 F.2d 1244. The order of the Federal Trade Commission (Pet. App. 128a-137a) and the Commission's opinion (Pet. App. 103a-128a) are reported at 91 F.T.C. 751, 834, 859.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 1979. On July 16, 1979, Mr. Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including September 14, 1979. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the First Amendment rights of petitioners, who had repeatedly made deceptive advertising claims unsupported by the information available to them, were violated by an order of the Federal Trade Commission prohibiting them from making safety or performance claims "unless petitioners have a reasonable basis for the representation(s) consisting of competent and objective material, available in written form, that fully and completely substantiates such representation(s)."

2. Whether the Commission has authority to impose such a prospective order to prevent future false advertising abuses by a firm which had repeatedly engaged in false advertising over a number of years.

STATEMENT

Petitioner Jay Norris, Inc. is a mail-order company that offers hundreds of gift and novelty items to consumers through catalogs and advertisements appearing in newspapers and other publications such as TV Guide. Petitioners Joel Jacobs and Mortimer Williams are the principal shareholders and officers of Jay Norris, Inc. (referred to collectively as "Jay Norris").

On complaint and after evidentiary hearings, the Commission found that Jay Norris had made product advertising claims that were false and misleading.[1] As summarized by the court of appeals, petitioners made (Pet. App. 4a-5a):

> false and deceptive advertising claims * * * as to efficacy, performance, and safety in connection with

[1]There were a number of other unfair and deceptive practices found by the Commission not directly related to the issues raised here by petitioners, including failure to perform promises of immediate delivery and prompt refunds. See Pet. App. 33a-34a, 38a-55a, 83a-84a, 87a-89a, 104a-108a.

> six widely varying products—(1) a propane "flame gun" that would "dissolve the heaviest snow drifts, whip right through the thickest ice"[4]; (2) roach powder that was "completely safe to use" and "never loses its killing power—even after years"[5]; (3) an "electronic miracle" that makes "your home wiring a huge [TV or FM radio] antenna for super reception"[6]; (4) a "5-year" flashlight that carries an "absolute 5-year guarantee"[7]; (5) a "minted" Lincoln-Kennedy ["]Commemorative" penny accompanied by a free "Plaque of Coincidences"[8]; and (6) "carefully maintained" cars "in regularly maintained fleet use * * * thoroughly serviced."[9] The quotations are selective and are by no means inclusive of the falsity and deception that the advertising blurbs relating to these six products display."[2]

[4]According to expert testing and consumer testimony, it did neither.

[5]It was neither safe nor so deadly.

[6]It does not.

[7]The manufacturer's guarantee was for five years[] *or* ten hours' use [original emphasis].

[8]There is no such official penny; and the item offered for sale has no numismatic or historical significance, is not "commemorative," and was never "minted." The "Plaque" was not free.

[9]The cars, no longer sold, were former New York City taxicabs, and many owners had nothing but trouble with them.

[2]For example, Jay Norris also falsely claimed that its roach powder could start "a deadly chain reaction * * * that wipes out every roach and every egg in" the nest and would prevent reinfestation for up to five years if left in place (Pet. App. 60a-61a, 110a-111a). But this powder, common boric acid long used to kill roaches, would cause no such "chain reaction," would have no effect on roach eggs at all, and would not remain effective for five years under normal conditions (Pet. App. 61a-63a). The flashlight manufacturers' guarantee

The Commission entered a cease and desist order which contains specific prohibitions against misrepresentations of the types found to have existed in the past, *e.g.*, a prohibition against "[m]isrepresenting, directly or indirectly, the time or manner in which [petitioners'] flame gun, or any other product used for the removal of snow or ice, will perform in the removal of snow or ice" (Pet. App. 134a). In addition, Paragraph 1.6 of the Commission's order, as rephrased by the court of appeals (Pet. App. 18a-19a),[3] forbids Jay Norris from:

> Representing the safety or performance characteristic(s) of any product unless respondents have a reasonable basis for the representation(s) consisting of competent and objective material, available in written form, that fully and completely substantiates such representation(s).[4]

As the court of appeals noted (Pet. App. 5a), the Commission gave careful consideration to Jay Norris' objections to the provision, and specifically did not prohibit Jay Norris, a mail order retailer selling products

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expressly warned that the light would "remain usable for a period of five years providing it has not been used more than 10 hours" (Pet. App. 66a). And the antenna was inferior to all of the "conventional home and 'rabbit-ears' antennas" with which it was compared (Pet. App. 71a n. 9, 115a). With respect to the false and misleading advertising claims generally, see Pet. App. 58a-80a, 108a-117a.

[3]The provision, before it was modified by the court of appeals "in the interest of clarity" (Pet. App. 18a), read:

> Representing the safety or performance of any product unless such claims are fully and completely substantiated by a reasonable basis which shall consist of competent and objective material available in written form [Pet. App. 134a].

[4]This requirement is essentially a more explicit statement of the requirements imposed by Congress in Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45 (Pet. App. 12a, 123a).

manufactured by others, from making any false, deceptive or misleading representations about these products. Rather than hold it strictly liable for the absolute truth of claims for products manufactured by someone else—claims they might reasonably base on the manufacturers' own claims—the Commission said it

> impose[d] a lesser remedy by requiring that respondents not make a safety or performance claim for any product without a reasonable basis. * * * [R]espondents must simply substantiate these claims, and this will absolve them of civil penalty liability should any claim ultimately be proven false * * *" [Pet. App. 123a n.30].

Aside from relying on the manufacturers' claims, Jay Norris could also comply by obtaining "technical advice of qualified persons * * * [in] writing" (Pet. App. 126a).

The Commission limited its order to representations of performance and safety.[5] But in light of Jay Norris' recidivist history of false advertising[6] and the fact that the violations involved "a wide variety of products and a wide variety of deceptive claims" (Pet. App. 125a), the Commission concluded that an order not covering all of its products "would do very little to protect the public."[7]

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[5]The provision recommended by the administrative law judge, broader than that issued by the Commission, required prior substantiation for representations of "any other characteristic" of a product (*e.g.*, value, sales prices, content, size, etc.) in addition to performance and safety representations (Pet. App. 99a).

[6]In addition to this proceeding petitioners were the subject of two Commission orders, in 1965 and 1968, and orders of the U.S. Postal Service in 1974 and the State of New York Bureau of Consumer Frauds and Protection in 1976 (Pet. App. 69a, 125a n.33).

[7]The Commission noted that since many products were involved and petitioners did not specialize in any one category of products, a narrower order would merely "shift [future deception] to a different part of respondents' catalog" because of petitioners' "penchant for misrepresentation" (Pet. App. 125a & n.35).

The court of appeals in affirming the Commission's order rejected Jay Norris' argument that Paragraph I.6 shifts to it the burden of proof in a subsequent proceeding to enforce a cease and desist order (Pet. App. 6a-11a). The Court further found that the Commission's order was within its authority and is "reasonably calculated to prevent violations of the sort found to have been committed" (Pet. App. 12a). It agreed with the Commission's reasoning that, as "Jay Norris is in a better position than consumers to evaluate safety and performance claims for products sold by it" and has a "proven predilection * * * to misstate these characteristics, the company [may] henceforth be required to have a reasonable basis for such claims" (Pet. App. 12a).

Finally, the court rejected petitioners' argument that the order deprives them of their First Amendment rights (Pet. App. 16a-18a).

ARGUMENT

This case does not raise any issues that warrant review by this Court. The courts have consistently upheld the Commission's authority to impose prior substantiation requirements in false advertisement cases like this one; the facts of this case provide ample justification for imposing the requirement against petitioners. Moreover, there is no conflict among the circuits over whether an order issued in these circumstances violates the First Amendment rights of petitioners.[8]

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[8]In urging the Court to review this case, petitioners state that the Commission has announced an intention to require all advertisers to abide by the provisions of Paragraph I.6, once the provision goes into effect (Pet. 3). In support of this assertion they refer to a passage in the Commission's opinion where, in rejecting an argument that prior substantiation requirements should be addressed solely in a rulemaking proceeding, the Commission stated "[m]oreover, under

1. Paragraph I.6 of the Commission's order does not, contrary to Jay Norris' contention, prohibit, "truthful advertising" (Pet. 13) or shift the burden of proof of veracity to Jay Norris (Pet. 18-19). The provision merely requires Jay Norris to have "reasonable basis" (consisting of "competent and objective material, available in written

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15 U.S.C. 45(m)[(1)(B)], the Commission is free to hold other concerns to the same standards we are imposing on these respondents, when the order we will enter becomes final" (Pet. App. 126a). Section 5(m)(1)(B) of the Federal Trade Commission Act, 15 U.S.C. 45(m)(1)(B), enacted in 1975, provides for civil penalty actions under certain circumstances against any person who engages in an act or practice which has been declared by the Commission to be unfair or deceptive in a previous adjudication leading to an order, "whether or not such person * * * was subject to such cease and desist order."

The Commission has authorized us to state that, contrary to what the quoted statement in its opinion may have implied, it has no intention of using Paragraph I.6 of the order as the predicate for a civil penalty suit against other advertisers. With respect to its authority under Section 5(m)(1)(B), the Commission takes the view that the unfair or deceptive acts or practices that can form the basis of a civil penalty action under that provision are those that are specifically adjudicated to be such in an administrative proceeding, not practices covered by an order such as Paragraph I.6 that goes beyond the specific practices that were adjudicated.

Nor is there any basis for petitioners' repeated assertions that the Commission has considered this a "test case" to expand its authority (Pet. 4, 9, 15). On the contrary, the Commission noted in its opinion that there was nothing novel about the substantiation requirement contained in its order—that similar requirements have been imposed many times and approved by the courts of appeals (Pet. 121a-122a). See, *e.g.*, *Fedders Corp.* v. *FTC*, 529 F.2d 1398 (2d Cir. 1976); *Firestone Tire & Rubber Co.* v. *FTC*, 481 F.2d 246 (6th Cir.), cert. denied, 414 U.S. 1112 (1973); see also *National Dynamics Corp.* v. *FTC*, 492 F.2d 1333 (2d Cir.) cert. denied, 419 U.S. 993 (1974); all cited and discussed by the court of appeals (Pet. App. 11a-12a).

form") to support an assertion of product safety or performance at the time it makes such an assertion in advertising. If it has competent documentation, either from its own examination or evidence obtained from a manufacturer, it would not be subject to liability under the order for making the claim even if the claim proved to be untrue. In any civil penalty proceeding brought for violation of Paragraph I.6, the government would have the burden of proving that Jay Norris made a safety or performance claim and that it lacked a reasonable basis when it did so. (If the Commission, however, believed that any advertising claim was deceptive because untrue, the Commission would have the burden of proving the untruth).

There is no substance to the contention that the Commission lacks authority to impose such a "fencing-in" requirement. In *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 395 (1965), the Court stated:

> We think it reasonable for the Commission to frame its order broadly enough to prevent respondents from engaging in similarly illegal practices in future advertisements. As we said in *Federal Trade Comm'n* v. *Ruberoid Co.*, 343 U.S. 470, 473: "[T]he Commission is not limited to prohibiting the illegal practice in the precise form in which it is found to have existed in the past." Having been caught violating the Act, respondents "must expect some fencing in." *Federal Trade Comm'n* v. *National Lead Co.*, 352 U.S. 419, 431.

The Commission is authorized to restrain similar or related acts, especially where violations have been extensive and substantial in number (*FTC* v. *National Lead Co.*, 352 U.S. 419, 430 (1957)), and its authority to fashion appropriate remedies has been likened to that of a

district court in issuing injunctive decrees. *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296, 311-312 & n.17 (1963). Here, the Commission carefully considered the scope of the order, reasonably ascertained that a narrower order would fail to protect the public (Pet. App. 124a-126a), and crafted an order that does no more than require a repeated and proven false advertiser to exercise a minimal degree of care in its advertising in the future.

Similar Commission orders requiring prior substantiation of advertising claims have been upheld by other courts of appeals as remedies in false advertising cases, *Porter & Dietsch, Inc.* v. *FTC*, 1979-2 Trade Cases (CCH), para. 62,796 at 78,625-78,626 (7th Cir. August 8, 1979), petition for cert. pending, No. 79-731; *Firestone Tire & Rubber Co.* v. *FTC*, 481 F.2d 246 (6th Cir.), cert. denied, 414 U.S. 1112 (1973); *Tashof* v. *FTC*, 437 F.2d 707, 715 (D.C. Cir. 1970). Furthermore, as the court below noted, the obligation imposed by the order provision is no greater than is required of all advertisers under the Federal Trade Commission Act: "It is merely more explicit" (Pet. App. 12a).

This Court has emphasized the limited scope of judicial review of Commission orders:

> The Commission has wide discretion in its choice of a remedy deemed adequate to cope with the unlawful practices in this area of trade and commerce. * * * [J]udicial review is limited. It extends no further than to ascertain whether the Commission made an allowable judgment in its choice of the remedy. * * * [T]he courts will not interfere except where the remedy selected has no reasonable relation to the unlawful practices found to exist.

Jacob Siegel Co. v. *FTC*, 327 U.S. 608, 611-613 (1946). See, also, *FTC* v. *Colgate-Palmolive Co.*, *supra*, 380 U.S. at 394-395; *FTC* v. *National Lead Co.*, *supra*, 352 U.S. at 428-430 & 430 n.7; *FTC* v. *Ruberoid Co.*, 343 U.S. 470 (1952). The court of appeals carefully reviewed the Commission's order and determined that it satisfied these tests (Pet. App. 11a-12a, 15a-16a). There is no need for further review.

2. Petitioners argue (Pet. 9-15) that there is a conflict among the circuits with respect to the test to be applied under the First Amendment in the regulation of commercial advertising because the court below failed to state in so many words that the Commission's order is no more restrictive than necessary to eliminate future deceptive advertising. But the Commission's order, in light of its careful and complete factual findings, was cautiously tailored to meet the practical business situation of Jay Norris and thus meets the standards articulated by any other courts of appeals cited by petitioners. More important, it clearly satisfies the test laid down by this Court most recently in *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978).

In *Professional Engineers*, an antitrust decree prohibited the Society from adopting any official statement representing or implying that competitive bidding is unethical. One of the issues before the Court was whether the decree violated the Society's First Amendment right of free expression.[9] The Court upheld

[9]The court of appeals had deleted a portion of the decree which ordered the Society to state that it did not consider competitive bidding to be "unethical," reasoning that "[t]o force an association of individuals to express as its own opinion judicially dictated ideas is to encoach on that sphere of thought and expression protected by the First Amendment. Any such regulation by the state should not be more intrusive than necessary to achieve fulfillment of the governmental interest." *United States* v. *National Society of Professional Engineers*, 555 F.2d 978, 984 (D. D.C. 1977). Contrary to Jay Norris' assertion (Pet. 11 n.17), this Court did not review the court of appeals' modification or the standard which it employed as the Government did not seek review of that decision. See 435 U.S. at 686 n.8. Moreover, the court of appeals was addressing a question of remedy not involved here, namely, whether an association of individuals can be required by a court to express as its own belief what is in essence a value judgment.

the decree and in doing so stated that "[t]he standard against which the order must be judged is whether the relief represents a reasonable method of eliminating the consequences of the illegal conduct" (435 U.S. at 698); that "[in] fashioning a remedy, the District Court may, of course, consider the fact that its injunction may inpinge upon rights that would otherwise be constitutionally protected, but those protections do not prevent it from remedying the antitrust violations" (*id.* at 697-698).

Professional Engineers reaffirmed the principle established in other cases that the First Amendment does not immunize proven violators from remedies designed to undo their past violations and to prevent future ones. As the Court stated in *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-772 (1976): "The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely." And in preventing potentially false and deceptive commercial speech, the government may if necessary prohibit some speech that is not, by itself, necessarily false or deceptive. Thus, in *Friedman* v. *Rogers*, 440 U.S. 1, 13 (1979), the Court upheld a state ban on the practice of optometry under a trade name because of "[t]he possibilities for deception * * *." In that case the state broadly banned all optometrists from using trade names.

Here, in contrast, the Commission's order applies only to an established violator and requires it to do no more than any reasonably careful businessmen would do in assuring that its advertisements were not false or misleading.

In any event, the Commission's order here meets the "least restrictive remedy" test urged by petitioners. The Commission considered petitioners' argument that the order should be limited to simple proscriptions against false advertisements of the precise type found and determined that such a limited order would be totally inadequate to protect the public in view of the numerous products and changing inventory offered by Jay Norris and its proclivity to misrepresent (Pet. App. 125a). The Commission found it necessary to require Jay Norris to substantiate all future performance and safety claims and to have such substantiation available in written form because to do otherwise would, based on petitioners' past conduct, place the Commission on an endless enforcement treadmill. Any actual "chilling" effect on truthful advertising should be minimal. Jay Norris sells products made by someone else. It may rely on the manufacturers' warranties or claims, or the written advice of a qualified technical expert. If petitioners are unable to obtain such minimal substantiation from the manufacturers, their advertising claims are likely to be untrue and thus not worthy of protection for transmittal to consumers. The prohibition of unsubstantiated claims by a retailer with a history of making egregiously false claims belied by the information available to it at the time does no violence to the First Amendment.

No other court of appeals decision is to the contrary. In *Standard Oil Co. of California* v. *FTC*, 577 F.2d 653 (9th Cir. 1978), the court in narrowing the coverage of the Commission's order to a particular product, generally

approved orders covering all of a firm's products, where, as in this case, the past false advertising showed "blatant and utter disregard of the law" and the seller "had a history of engaging in unfair trade practices" (577 F.2d at 662-663). In that case, only a single product of a manufacturer of thousands of items was improperly advertised and that company "never before been accused of false advertising" (*id.* at 663). By contrast, Jay Norris was found to have engaged in false advertising of a number of products. Two other cases on which petitioners rely provide them no support; one involved the requirement of affirmative corrective advertising to undo the deception in prior false advertisements. Such corrective advertising was approved in *Warner-Lambert Co.* v. *FTC*, 562 F.2d 749 (D.C. Cir. 1977), cert. denied, 435 U.S. 950 (1978). The other case involved a Commission order requiring an advertiser to make certain affirmative disclosures when it made certain representations that would be otherwise misleading; the court modified the order slightly. *National Commission on Egg Nutrition* v. *FTC*, 570 F.2d 157, 164 (7th Cir. 1977), cert. denied, 439 U.S. 821 (1978). The Commission's order in this case, however, imposes no such affirmative disclosure requirement and those cases are therefore inapposite.[10]

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[10]In *Beneficial Corp.* v. *FTC*, 542 F.2d 611 (3d Cir. 1976), cert. denied, 430 U.S. 983 (1977), the Third Circuit required the Commission to use a more exact and refined prohibition than its proscription of the phrase "Instant Tax Refunds," where the Commission found that it had been used deceptively in the past as a label for a small loan company's standard loans. Although we believe the Third Circuit erred in concluding that the remedy imposed by the Commission in that case was not adequately tailored to the violations proved, the facts of this case are quite different, and, as we have shown, amply support the Commission's remedy.

3. Jay Norris' argument (Pet. 20-22) that the order is impermissibly vague is insubstantial. Petitioner's argument appears to be based primarily on the complaint that the Commission and the court of appeals failed to declare whether certain types of representations would come within the terms of the order (see Pet. 6 and Pet. App. 138a-139a). Such declaratory advice is not the function of a cease and desist order; it is sufficient if the terms are clear enough "to avoid raising serious questions as to their meaning and application" (*FTC* v. *Henry Broch & Co.*, 368 U.S. 360, 367-368 (1962)) and "are as specific as the circumstances will permit" (*FTC* v. *Colgate Palmolive Co.*, *supra*, 380 U.S. at 393). Moreover, as the Court stated in *Colgate-Palmolive, supra*, 380 U.S. at 394, if Jay Norris is "sincerely unable to determine whether a proposed course of action would violate the present order, [it] can, by complying with the Commission's rules, oblige the Commission to give [it] definitive advice as to whether [its] proposed action, if pursued, would constitute compliance with the order" (footnote omitted). See 16 C.F.R. 3.61(d). See also *National Society of Professional Engineers* v. *United States*, *supra*, 435 U.S. at 698-699.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1979

DOJ-1979-11